EXPLANATION OF RECORDS

A Condemnation Case from U. S. D. C. of Nebraska, Omaha Division

The printed record on the appeal to U. S. C. C. A. consists of *three* separate, bound volumes as follows:

Volume I. Pages 1 to 180	The filings and entries in the office of the Clerk of the U. S. D. C. at Omaha; court's instructions; appeal papers to U. S. C. C. A.; certificates of both Clerks.
Volume II. Pages 180 to 460	The testimony introduced and proceedings at the trial by the respondent, Kimball Laundry Co., appellant in U. S. C. C. A.
Volume III. Pages 461 to 868	The testimony introduced and proceeding at the trial by the petitioner, United States of America, appellee in U. S. C. C. A.

The original typewritten record made by the official court reporter in the United States District Court consisted of four separate volumes of the proceedings at the trial. The original typewritten Volumes I (pp. 1-396) and III (pp. 1050-1097) contained the oral testimony and exhibits of the respondent, Kimball Laundry Company, the exhibits being separately bound by the court reporter in said Volume III. The original typewritten Volume II (pp. 397-913, 916-1009, 1010-1049D) and Volume IV (pp. 1098-1122) consisted of the oral testimony and exhibits of the petitioner, the United States of America, the exhibits being bound separately in said Volume IV. A separate typewritten index was compiled by the court reporter for these four typewritten volumes.

The transcript of the Clerk of the United States District Court consisted of 174 pages.

These four original typewritten volumes plus the transcript of the Clerk of the U. S. D. C. constitute the original records from the U. S. D. C. These originals have all been compiled into the aforementioned *three printed volumes* for the U. S. C. C. A.

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(Compiled from Clerk's certified transcript on file)

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[fol. 4] IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEBRASKA
OMAHA DIVISION

No. 404 Civil

UNITED STATES OF AMERICA,

Petitioner,

v.

KIMBALL LAUNDRY COMPANY, A Corporation,
and
COUNTY TREASURER OF DOUGLAS COUNTY,
NEBRASKA,

Respondents.

INTRODUCTION

BE IT REMEMBERED, That on the dates herein shown, certain papers were filed, orders and records made and entered in the above entitled matter, in the words and figures following, to wit:

[fol. 5] PETITION IN CONDEMNATION

Filed Nov. 21, 1942

The petition of the United States, a sovereign, brought by Joseph T. Votava, United States Attorney for the District of Nebraska, acting under the instructions of the Attorney General of the United States, and at the request of the Secretary of War, represents to the Court as follows:

1. This is a suit of a civil nature brought by the above-named Petitioner under the authority of and pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U. S. C. Sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Act authorizes the acquisition of property for military purposes, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes.

2. That the Secretary of War is authorized to acquire by purchase, condemnation or otherwise such tracts or parcels of real estate and personal property in Douglas County, Nebraska, as may be necessary in his discretion for war purposes; that the property hereinafter described is necessary for war purposes, to-wit: to maintain and operate a laundry for the use of the Armed Forces of the United States.

3. That the Secretary of War, pursuant to the authority in him vested by said Acts of Congress, has found and determined that it is necessary and advantageous, and to the interest of the United States to acquire by condemnation, under judicial process, for public use for military [fol. 6] and defense purposes, the following described property, to-wit:

The right to use and occupy the property known as the Kimball Laundry, owned and operated by the Kimball Laundry Company, a corporation, located at 1504 Jones Street, Omaha, Nebraska, consisting of the real estate known as the East 22 Feet of Lot 7, and all of Lot 8, Block 171, Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

4. That the estate sought to be taken for said public use of the aforesaid rights to use and occupy said property is a terminable estate ending June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter for the duration of the present emergency as determined by the President of the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines.

5. That pursuant to the provisions of an Act dated March 27, 1942 (Public Law 507—77th Congress), the United

States of America in time of war has the right upon the filing of this Petition to take immediate possession of the aforesaid property; that the immediate and full possession of said property is indispensable to this Petitioner so that the Government may successfully carry on the war in which the Nation is now engaged, and to that end it is necessary that possession be given on the morning of November 22, 1942; that by a letter dated November 21, 1942, the Secretary of War requested the Attorney General of the United States to insitute these proceedings, and in pursuance of said request the Attorney General has instructed the undersigned, the United States Attorney for the District of Nebraska, to institute these proceedings for the condemnation of said property; that a plat of the above-described real estate, showing the lands involved in this proceeding, is attached hereto, marked Exhibit "A", and by reference [fol. 7] made a part of this Petition; that duly prepared and certified abstracts of title to the lands involved will be deposited with the Clerk of this Court for the use of the Appraisers to be selected and of this Court during the pendency of these proceedings, but to be withdrawn upon the conclusion thereof; that satisfactory and adequate appropriation and provision for just compensation for the property sought to be taken herein for the purpose aforesaid, has been made by an appropriation under an Act of Congress of July 2, 1942 (Public Law No. 649 —77th Congress).

6. The Petitioner is informed and believes, and therefore alleges that the following named Respondents have or claim to have some title or interest in the lands involved:

Kimball Laundry Company, a corporation, which appears to be the owner of all of the aforesaid property.

7. That the County Treasurer of Douglas County, Nebraska claims and appears to have some interest in the property involved by reason of taxes and assessments which may be due and owing, or which may be levied against the aforesaid property, and said County Treas-

urer is made a party Respondent herein as the proper official for the collection of all taxes and assessments that may be due and owing, or that my inure to the benefit of the State of Nebraska, the County of Douglas, Nebraska; or any subdivision of the State of Nebraska, or any municipal corporation which may have tax claims either general or special against the property involved herein.

WHEREFORE, the premises considered and to the end that the property described in this Petition and hereby sought to be taken, that is, the right to use and occupy the aforesaid Kimball Laundry property, may be acquired by the United States of America by condemnation in accordance with the several statutes and Acts of Congress in such cases made and provided, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, the Petitioner prays this Honorable Court:

[fol. 8] 1. To appoint six qualified, competent and disinterested freeholders as Appraisers to appraise the value of the property sought to be condemned in accordance with the law and statutes in such cases made and provided, requiring said Appraisers before entering upon their duties to take and subscribe an oath to fairly and impartially appraise the value of the interest of the several owners of said property; to direct the Clerk of this Court immediately by registered mail to call said Appraisers to meet at the premises involved herein not less than thirty days nor more than forty days after their appointment; to direct the Clerk of this Court to cite said Respondents herein by serving upon each of said Respondents a notice of such meeting of said Appraisers either by registered letter not less than fifteen days prior to said meeting of Appraisers, or by personal service of such notice at least ten days prior to said meeting.

2. To direct that such Appraisers so appointed shall inspect and view the property involved herein in this condemnation proceeding on the day appointed in such notice, or on any subsequent day to which they may adjourn said meeting, and to hear all interested parties,

and after such hearing to direct them to assess the value of the property for damages or compensation which the owners thereof may sustain by the appropriation of said property, and to make an itemized report of such assessment in writing to this Court.

3. The Petition further prays that the compensation of the Appraisers be prescribed, and that this Court take such further action and enter such other orders, decrees and judgments as may be necessary or proper to fully effect the objects for which the aforesaid Acts of Congress, insofar as they relate to the acquisition of the aforesaid property, were passed, and cause the property described in this Petition, and being the right to use and occupy the aforesaid Kimball Laundry, to vest in the United States by an appropriate title, subject, however, to easements for public roads and highways, for public utilities, for railroads and for pipe lines.

4. The Petitioner prays for immediate possession of the property involved herein, and it prays for such other [fol. 9] and further relief as the nature of the case may require, and as shall seem proper to the Court.

UNITED STATES OF AMERICA,
Petitioner,

By JOSEPH T. VOTAVA,
United States Attorney for the District of Nebraska, Attorney for Petitioner.

And A. Z. DONATO,
Special Attorney, Department of Justice, Attorney for Petitioner.

(Duly verified before Clerk U. S. D. C. on Nov. 21, 1942.)

[fol. 11]

ORDER

Filed Nov. 21, 1942.

This cause coming on to be heard upon the motion of Joseph T. Votava, United States Attorney in and for the District of Nebraska, Attorney for the Petitioner herein, for an Order of immediate possession, and of the right to use and occupy forthwith the property known as Kimball Laundry, said property being more fully described

LIBRARY
SUPREME COURT, U.S.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 180)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 63 63

KIMBALL LAUNDRY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

in the Petition filed herein, and upon consideration of said motion and of the Petition in Condemnation presented to the Court, and in consideration of the statutes in such cases made and provided, and particularly Section 171, Title 50 of the United States Code, as amended, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain, including the right to use and occupy real and personal property, for the purposes set out in said Petition in Condemnation;

Second: That a Petition was filed at the request of the Secretary of War and that it was filed also under the authority of the Attorney General of the United States.

Third: That said Petition states the authority under which the public use for which said property is taken; that the Secretary of War is the person duly authorized and empowered by law to acquire the property and the right to use and occupy the property, such as is described in the petition, for military and defense purposes, and the [fol. 12] Attorney General of the United States is the person authorized by law to direct the institution of such Condemnation Proceedings upon being requested by the Secretary of War to do so.

Fourth: And it further appearing that on the day the Petition in this proceeding was filed, it also appeared to the satisfaction of the Court that, by a letter dated November 21, 1942, the Secretary of War requested the Attorney General of the United States to acquire by Condemnation the rights to use and occupy the Kimball Laundry property located on the real estate described in the Petition, together with all the personal property thereon and therein, and used in connection therewith, exception only delivery equipment, and further requested the immediate right of possession to so use and occupy said Kimball Laundry.

Now therefore, in consideration of the foregoing, and whereas this Country is now at War, and the possession of said property and the right to use and occupy the same is needed in order that the Government may successfully prosecute the War in which the Nation is now engaged,

VOLUME I

TRANSCRIPT OF RECORD

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 13494

CIVIL

KIMBALL LAUNDRY COMPANY, A Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

FILED FEBRUARY, 11, 1907.

CONTENTS.

This volume contains all the pleadings, filings, orders, instructions given and refused, judgment, motion for new trial and appeal papers.

and proper showing having been made to the Court of the necessity of such immediate possession and of the necessity of the immediate right to use and occupy said property, it is

Therefore ordered, adjudged and decreed that the United States of America, Petitioner herein have immediate possession, and

(Same description as petition)

[fol. 13] The possession of the Petitioner, however, shall be subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The possession and the right to occupy and use said property shall begin on the morning of November 22, 1942, on condition that a copy of this Order shall be served upon the respondent, Kimball Laundry Company prior to the taking over of business of said property.

It is further ordered that for a reasonable length of time, the respondent, Kimball Laundry Company, through its officers and representatives, shall have the right to enter upon said premises within reasonable hours and in the presence of the representatives of the Petitioner, to make an inventory of the various items of personal property being taken over, with the right to use and occupy the same by the Petitioner, so that an orderly transfer and a record of such transfer may be made by the respondent, Kimball Laundry Company to the Petitioner herein.

It is further ordered that inasmuch as the Petitioner, by Acts of Congress, has made certain and adequate provisions for the payment of just compensation to the party or parties entitled thereto, as hereinbefore more fully set forth, it shall not be necessary that the United States of America deposit, or cause to be deposited, any sum or sums of money, or other form of security of any amount or nature, for the purpose of securing the payment of just compensation to the party or parties entitled thereto.

It is further ordered and directed that a certified copy of the original letter from the Secretary of War to the Attorney General of the United States, hereinbefore referred to, requesting the Condemnation Proceedings, shall

		Original Transcript	Printed Vol. I
15	Notice of Appeal of U.S. to the U.S.D.C. from award of Board of Appraisers, filed December 1, 1943	50	39
16	Notice of Appeal of Kimball Laundry Co. to U.S.D.C. from award of Board of Appraisers, filed December 11, 1943	51	39
17	Motion to Tax Costs Incurred Before Appraisers, filed by Kimball Laundry Co. December 11, 1943	52	40
18	Petition in Error to U.S.D.C. from award of Appraisers by Kimball Laundry Co., filed December 18, 1943	55	44
19	Appeal Undertaking, filed by Kimball Laundry Co. December 18, 1943	64	52
20	Application of Respondent, Kimball Laundry Co., to Withdraw Funds Deposited in Court without Prejudice, on Account, filed February 1, 1944	65	52
21	Order Permitting Withdrawal of Funds without Prejudice (Donohoe, D. J.), filed February 1, 1944	66	53
22	Stipulation, filed March 25, 1944, Agreeing Motion to Tax Costs (17) to be Ruled on at Close of Case	67	54
23	Order (Donohoe, D. J.), filed March 25, 1944, Overruling Motion to Tax Costs, without Prejudice to Renew at Close of Trial	68	54
24	Request by Respondent for Pretrial Hearing in U.S.D.C., filed April 3, 1944	69	55
25	Supplemental Declaration of Taking, filed in U.S.D.C. by Petitioner on April 6, 1944	70	55
26	Ex parte Judgment on Supplemental Declaration of Taking, filed April 6, 1944	71	56
27	Application of Respondent to Withdraw Funds Deposited in Court, without Prejudice, filed April 13, 1944	74	58
28	Order Permitting Withdrawal of Funds without Prejudice (Donohoe, D. J.), filed April 13, 1944	75	59
29	Respondent's Motion to Advance Cause in U.S.D.C. for Final Disposition, filed May 2, 1944	76	60
30	Notice to Kimball Laundry Co. that Possession of U.S. had been Extended, filed May 31, 1944	79	65
31	Motion of U.S. to Extend Term Condemned, filed May 31, 1944	81	65
32	Ex parte Order on Motion to Extend Term (Donohoe, D. J.), filed May 31, 1944	84	66
33	Affidavit of Mailing of Notice that Possession had been Extended, filed June 5, 1944	87	67
34	Supplemental Declaration of Taking, filed in U.S.D.C. by Petitioner on August 10, 1944	88	67

		Original Transcript	Printed Vol. I
35	Ex parte Judgment on Supplemental Declaration of Taking, filed August 12, 1944	89	68
36	Application of Respondent to Withdraw Funds Deposited in Court, without Prejudice, filed August 18, 1944	92	71
37	Order (Donohoe, D. J.), filed August 18, 1944, Permitting Withdrawal of Funds Deposited without Prejudice	93	72
38	Second Motion of Respondent to Advance Case for Trial, filed October 25, 1944	94	73
39	Motion to Strike Respondent's Answer (13) dated August 23, 1943, filed May 12, 1945 (Answer stricken during trial)	97	76
40	Notice of Hearing on Motion to Strike Answer, filed May 12, 1945 (Answer stricken during trial, March 4, 1946, Print Vol. II, p. 183)	103	82
41	Motion to Strike Petition in Error and Transcript of Evidence, filed May 17, 1945 (Order entered striking Petition in Error during trial, March 4, 1946, Print Vol. II, p. 183)	104	82
42	Notice that Term had been Extended, filed May 28, 1945	105	82
43	Motion of U.S. to Extend the Term Condemned, filed May 28, 1945	107	83
44	Ex parte Order on Motion to Extend Term (Donohoe, D. J.), filed May 28, 1945	110	84
45	Affidavit of Mailing, Advising Kimball Laundry Co. that Term had been Extended, filed June 1, 1945	113	85
46	Supplemental Declaration of Taking by U.S., filed in U.S.D.C. on August 8, 1945	114	85
47	Ex parte Judgment on Supplemental Declaration of Taking, filed August 8, 1945	115	86
48	Application of Respondent to Withdraw Funds Deposited in Court, without Prejudice, filed August 11, 1945	118	88
49	Order to Withdraw Funds without Prejudice (Donohoe, D. J.), filed August 11, 1945	119	89
50	Third Written Motion of the Respondent, Kimball Laundry Co., to advance case for Trial in U.S.D.C., filed January 18, 1946	120	90
51	Respondent's New Petition on Appeal to U.S.D.C. from Appraisers' Report, filed March 18, 1946, during trial	121	91
52	Motion to Strike Respondent's New Petition (50) on Appeal to U.S.D.C. from Appraisers' Report, filed March 18, 1946. (Petition stricken during trial, March 20, 1946, Print Vol. III, p. 863)	125	95

		Original Transcript	Printed Vol. I
53	Verdict of Jury, filed March 20, 1946	126	95
54	Notice to Kimball Laundry Co. of Surrender of Possession by Government, filed March 22, 1946 (Verdict, March 20, 1946)	128	97
55	Motion in Arrest of Judgment, filed March 27, 1946	129	97
56	Judgment of U.S.D.C. on Verdict of Jury, filed April 9, 1946	132	101
57	Motion of Respondent, Kimball Laundry Co., for New Trial, filed April 19, 1946	138	107
58	Stipulation Regarding Purchase of Certain Surplus Equipment by Kimball Laundry Co. from U.S. without prejudice to cause or appeal, filed May 8, 1946	157	134
59	Judgment on Stipulation (58), without Prejudice, filed May 8, 1946	159	136
60	Application for Order to Withdraw Funds, without Prejudice, from the Registry of the Court, deposited after Judgment by U.S., filed August 8, 1946	161	137
61	Order Allowing Partial Withdrawal, After Judgment, without Prejudice to Appeal on Merits, of Funds Deposited in the Registry of the Court by U.S., filed August 16, 1946	163	139
62	Notice of Appeal to Circuit Court of Appeals for the Eighth Circuit Under Rule 73b (by Kimball Laundry Co., Respondent), filed November 14, 1946	164	140
63	Bond on Appeal, filed November 14, 1946	165	141
64	Clerk's Proof of Mailing Copy of Notice of Appeal, filed November 14, 1946	166	141
65	Order of U.S.D.C. Extending Time for Filing Record on Appeal, filed December 21, 1946	167	141
66	Stipulation re Points Relied on for Reversal (to be placed in brief rather than in record) filed February 3, 1947	168	142
67	Designation of Record on Appeal as stipulated by Kimball Laundry Co. and Petitioner, filed February 3, 1947	169	143
68	Certificate of Clerk	174	149

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Instructions of the Court after trial ..... Vol. II, 1010 150

Respondent's Exceptions to Court's Instructions ..... Vol. II, 1036 165

Additional Instructions Given the Jury by the Court to Disregard Certain Evidence of Value ..... Vol. II, 1040 167

Government's Requested Instructions	Vol. II, 1042-A 169
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Further Instructions of the Court	Vol. II, 1043 178
Verdict of the Jury	Transcript, 126 95-6
Special Findings of Jury	Vol. III, 1046 96, and Vol. III, p. 864

Special index to court's rulings during trial on evidence and exhibits on motions and applications appears separately in appellant's brief.

Respective indexes to Vol. II. and Vol. III of printed record (altogether there are three volumes of printed record), are separately set forth in each of said printed volumes.

Printed Vol. II contains proceedings of Kimball Laundry Co. at trial.

Printed Vol. III contains proceedings of petitioner, United States of America, during trial.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1948, of said Court, before the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 11th day of February, A. D., 1947, a transcript of record pursuant to an appeal taken from the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Kimball Laundry Company, a Corporation, was Appellant, and the United States of America was Appellee.

Printed record filed on July 2, 1947, composed of three volumes, Volume I consisting of pages a to 180, inclusive, Volume II consisting of pages 181 to 460, inclusive, and Volume III consisting of pages 461 to 868, inclusive, on which the appeal was heard in said Circuit Court of Appeals, and proceedings in said Circuit Court of Appeals, composed of one volume, Volume IV, consisting of pages 1 to 22, are in the words and figures following, to-wit:

Pursuant to the provisions of the Act of Congress approved February 26, 1931, and the Acts of Congress recited in the petition filed in the above-entitled proceeding, it is requested that you cause the inclosed declaration of taking to be filed in the pending action. The estate to be acquired, the description of the land, and the name of the purported owner of said land are set forth in the declaration of taking, which includes all of the land involved in the proceeding. The sum estimated to be just compensation for the taking of said land, and for the condemnation of the personal property described in the petition for the term commencing November 23, 1942 and ending June 30, 1943, inclusive of all rights set forth in the declaration of taking, is $30,140.00, check for which amount, payable to the order of the Clerk of the United States District Court for the District of Nebraska, is inclosed for deposit in the registry of the court.

Appraisals and title evidence will be procured by this Department and furnished your field representative.

Three copies of the declaration of taking are inclosed.

Sincerely yours, Henry L. Stimson, Secretary of War.

2 Inclosures: 1—Check 2—D. T. (in quad.)

[fol. 29] DECLARATION OF TAKING

Filed June 19, '43.

To the Honorable, the United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The real property hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507 - 77th Congress), which acts authorize the acquisition of real and personal property for military or other war purposes, and the Act

of Congress approved July 2, 1942 (Public Law 649 - 77th Congress), which act appropriated funds for such purposes.

(b) The public uses for which said real property is taken are as follows: The said real property is necessary adequately to provide for a military laundry, and for other military purposes incident thereto. The said real property has been selected by me for acquisition by the United States for use in connection with the establishment of a military laundry located in the City of Omaha, Nebraska, and for such other uses as may be authorized [fol. 30] by Congress or by Executive Order, and is required for immediate use.

2. A general description of the real property taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same real property described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years ending June 30, 1943, in the real property above referred to, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof.

4. A plan showing the real property taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said real property, with all buildings and improvements thereon and all appurtenances thereto, including any and all interests hereby taken in said real property, together with all personal property located on said real property and used in connection with the operation of the laundry located thereon for the term commencing November 23, 1942, and ending June 30, 1943, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the

be filed with the Clerk of this Court and be made a part of the records in these proceedings.

It is further ordered that a certified copy of this order be served upon each respondent herein.

It is further ordered, adjudged and decreed that this cause is held open for such other and further Orders, Judgments and Decrees as may be necessary in the prem-
[fol. 14] ises, including modification of this Order for immediate possession, if good cause be shown that this Order for immediate possession should be modified.

Entered this 21st day of November, 1942.

J. A. DONOHOE,
United States District Judge.

[fol. 15] The Honorable, The Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

It is necessary and advantageous to the interest of the United States that certain property known as the Kimball Laundry, located at 1504 Jones Street, in the City of Omaha, County of Douglas, State of Nebraska, be acquired by the United States of America for military purposes.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of real and personal property for military or other war purposes, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term for years ending June 30, 1943, in the land above referred to, together with the right in the United States, at the election of the Secretary of War, to use the property for additional yearly periods thereafter during the existing emergency, as determined by the President, and for the condemnation for the same

term of all personal property located on said land and used in connection with the operation of the laundry located thereon, excepting, however, all delivery equipment used in connection with the operation of said laundry. The map, description and names of the purported owners of the aforementioned real and personal property have been furnished Mr. Joseph T. Votava, United States Attorney, Federal Building, Omaha, Nebraska, by Mr. Clyde Worrall of the Office of the Division Engineer, Missouri River Division.

The Act of Congress approved July 2, 1942, supra, appropriated funds to acquire the real and personal property under consideration.

The aforementioned real and personal property are to be utilized to provide laundering facilities for certain stations in the Seventh Service Command, and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested, therefore, that pursuant to the provisions of the Act of Congress approved March 27, 1942, supra, you procure from the Court an order granting immediate possession of the aforesaid real and personal property.

[fol. 16] An appraisal report is being obtained under the supervision of Major Gordon Britton, the Division Real Estate Officer, Missouri River Division, Farm Credit Building, Room 539—208 S. 19th Street, Omaha, Nebraska, and the probable date of availability of the appraisal report can be obtained by your field representatives from the Division Real Estate Officer. No arrangements have been made by this Department for the procurement of title evidence. It is also requested that you instruct your local representative to furnish a copy of the petition direct to Major Gordon Britton.

Sincerely yours, Henry L. Stimson, Secretary of War

Filed Nov. 25, '42.

[fol. 17]

ORDER

Filed Nov. 25, '42

This cause coming on to be heard upon the motion of Joseph T. Votava, United States Attorney in and for

the District of Nebraska, Attorney for the Petitioner herein, for an Order of immediate possession, and of the right to use and occupy forthwith the property known as Kimball Laundry, said property being more fully described in the Petition filed herein, and upon consideration of said motion and of the Petition in Condemnation presented to the Court, and in consideration of the statutes in such cases made and provided, and particularly Section 171, Title 50 of the United States Code, as amended, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain, including the right to use and occupy real and personal property, for the purposes set out in said Petition in Condemnation;

Second: That a Petition was filed at the request of the Secretary of War, and that it was filed also under the authority of the Attorney General of the United States.

Third: That said Petition states the authority under which and the public use for which said property is taken; that the Secretary of War is the person duly authorized and empowered by law to acquire the property and the right to use and occupy the property, such as is described in the petition for military and defense purposes, and the [fol. 18] Attorney General of the United States is the person authorized by law to direct the institution of such Condemnation Proceedings upon being requested by the Secretary of War to do so.

Fourth: And it further appearing that on the day the Petition in this proceeding was filed, it also appeared to the satisfaction of the Court that, by a letter dated November 21, 1942, the Secretary of War requested the Attorney General of the United States to acquire by Condemnation the rights to use and occupy the Kimball Laundry property located on the real estate described in the Petition, together with all the personal property thereon and therein, and used in connection therewith, exception only delivery equipment, and further requested the immediate right of possession to so use and occupy said Kimball Laundry.

Now, therefore, in consideration of the foregoing, and whereas this Country is now at War, and the possession of said property and the right to use and occupy the same is needed in order that the Government may successfully prosecute the War in which the Nation is now engaged, and proper showing having been made to the Court of the necessity of such immediate possession and of the necessity of the immediate right to use and occupy said property, it is

Therefore, ordered, adjudged and decreed that the United States of America, Petitioner herein have immediate possession and

(Same description as in Petition.)

[fol. 19] The possession of the Petitioner, however, shall be subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The possession and the right to occupy and use said property shall begin on the morning of November 22, 1942, on condition that a copy of this Order shall be served upon the respondent, Kimball Laundry Company prior to the taking over of business of said property.

It is further ordered that for a reasonable length of time, the respondent, Kimball Laundry Company, through its officers and representatives, shall have the right to enter upon said premises within reasonable hours and in the presence of the representatives of the Petitioner, to make an inventory of the various items of personal property being taken over, with the right to use and occupy the same by the Petitioner, so that an orderly transfer and a record of such transfer may be made by the respondent, Kimball Laundry Company to the Petitioner herein.

It is further ordered that inasmuch as the Petitioner, by Acts of Congress, has made certain and adequate provisions for the payment of just compensation to the party or parties entitled thereto, as hereinbefore more fully set forth, it shall not be necessary that the United States of America deposit, or cause to be deposited, any sum or sums of money, or other form of security of any

amount or nature, for the purpose of securing the payment of just compensation to the party or parties entitled thereto.

It is further ordered and directed that a certified copy of the original letter from the Secretary of War to the Attorney General of the United States, hereinbefore referred to, requesting the Condemnation Proceedings, shall be filed with the Clerk of this Court and be made a part of the records in these proceedings.

It is further ordered that a certified copy of this order be served upon each respondent herein.

It is further ordered, adjudged and decreed that this cause is held open for such other and further Orders, Judgments and Decrees as may be necessary in the pre-
[fol. 20] ises, including modification of this Order for immediate possession, if good cause be shown that this Order for immediate possession should be modified.

Entered this 21st day of November, 1942.

Served Nov. 25, '42 Signed U. S. D. Judge.

[fol. 21] MOTION TO EXTEND TERM CONDEMNED

Filed May 11, '43.

Whereas, on November 21, 1942, there was filed herein a petition for the condemnation of an estate for years, ending June 30, 1943 on the real estate described in Exhibit "A", attached hereto, and made a part hereof; and

Whereas, an order for immediate possession was entered in said cause on November 21, 1942 giving the petitioner immediate possession of said real estate; and

Whereas, the petitioner is now, and has been since the entry of said order, in possession of the real estate involved herein; and

Whereas, the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year, ending June 30, 1944, and has elected so to do; and

Whereas, by letter dated April 20, 1943, a copy of which is attached hereto and marked Exhibit "B", the Secretary of War notified the Attorney General of such election and requested that proper notice of such election be

filed herein and copy thereof be transmitted to each interested party; and

Whereas, the Attorney General has instructed the United States Attorney for the District of Nebraska to carry out the request of the Secretary of War; and

Whereas, a notice, such as is referred to in Exhibit "B", attached hereto, has been filed herein.

Now, therefore, the petitioner moves the Court for an order extending the term which was condemned in said real estate and confirming and extending the possession thereof in the United States for an additional year, ending June 30, 1944.

(Signed U. S. D. Atty.)

[fol. 22] EXHIBIT "A"

The East Twenty-Two Feet (E. 22') of Lot Seven (7), and all of Lot Eight (8), in Block One Hundred Seventy-One (171), Original City of Omaha, and a strip one foot (1') wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

[fol. 23] EXHIBIT "B" War Department Washington

The Honorable
The Attorney General,
Washington, D. C.

Dear Mr. Attorney General: Apr 20 1943

Reference is made to the several condemnation proceedings which have been instituted at the request of this Department to acquire terms for years in various properties for military purposes.

It is deemed necessary and advantageous to the interests of the United States to extend the term condemned to June 30, 1944, since the use and possession of such properties will be required for military purposes for an additional year.

You are, therefore, notified that I have elected to extend the term which was condemned for an additional

year, ending June 30, 1944, in each of the condemnation proceedings listed in the inclosed Exhibit "A". It is requested that you file a proper notice of this election with the court and cause copies of such notice to be transmitted to all interested parties.

Sincerely yours, Henry L. Stimson, Secretary of War.

[fol. 24] ORDER ON MOTION TO EXTEND TERM

Filed May 11, '43.

Now on this 11th day of May, 1943, this cause came on to be heard on the motion of the petitioner herein for an order extending the term condemned in said cause, and the evidence, and was submitted to the Court, and the Court being advised in the premises, finds:

That on November 21, 1942, there was filed herein a petition for the condemnation of an estate for years, ending June 30, 1943, on the real estate hereinafter described and that on said day an order for immediate possession of said real estate was entered herein.

That by virtue of said order, the petitioner has been since said time and is now in possession of the real estate involved herein.

That the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year, ending June 30, 1944, and has elected so to do.

That the Secretary of War has requested the Attorney General, who has instructed the United States Attorney for the District of Nebraska, to file notice of such election and to transmit a copy thereof to each interested party, and that such notice has been filed in this proceeding.

Wherefore, it is considered, ordered and adjudged that the term in the real estate described in Exhibit "A", hereto attached and made a part hereof, which was condemned, and possession thereof given petitioner in the order entered on November 21, 1942, be, and the same hereby is extended for an additional year, ending June 30, 1944, and the possession of the petitioner of said real

estate is hereby confirmed and extended for a like period, ending June 30, 1944.

(Signed U. S. D. Judge.)

[fol. 25] EXHIBIT "A"

(Same description as in Motion to Extend Term, Folio 22.)

[fol. 26] NOTICE

Filed May 11, '43.

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska.

You and each of you are hereby notified that the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned in the real estate described in Exhibit "A" attached hereto and made a part hereof, to June 30, 1944, since the use and possession of such properties will be required for military purposes for an additional year.

You are further notified that the Secretary of War has elected to extend the term which was condemned in said real estate for an additional year, ending June 30, 1944.

Dated this 11th day of May, 1943.

(Signed U. S. D. Atty.)

[fol. 27] EXHIBIT "A"

(Same description as in Motion and Order to Extend Term, Folio 22.)

[fol. 28] Dated 6-8-43. Filed 6-19-43.

The Honorable, The Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

Reference is made to the condemnation proceeding entitled United States of America vs. the Kimball Laundry Company, a corporation, et al, Civil No. 404, in the United States District Court for the District of Nebraska, which was instituted to acquire a term for years in certain property known as the Kimball Laundry, Omaha, Nebraska.

ultimate award for said real and personal property included in this proceeding will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 8th day of June, A. D. 1943, in the City of Washington, District of Columbia.

Henry L. Stimson, Secretary of War of the United States.

[fol. 31] SCHEDULE "A"

The real property which is the subject matter of this Declaration of Taking aggregates .26 of an acre, more or less, situate and being in the County of Douglas, State of Nebraska. A description of the real property taken, together with the name of the purported owner thereof, and a statement of the sum estimated to be just compensation for the period commencing November 23, 1942, and ending June 30, 1943, is as follows:

Description;

The East 22 feet of Lot 7, all of Lot 8, and a strip of land one foot wide adjoining the North side of said real estate, all in Block 171, Original City of Omaha, Douglas County, Nebraska, containing .26 of an acre, more or less.

Name of Purported Owner: Kimball Laundry Company, a Corporation

Address of Purported Owner: Omaha, Nebraska

Estimated Compensation from November 23, 1942, to June 30, 1943: $30,140.00.

The gross sum estimated to be just compensation for the real property hereby taken, and for the condemnation of the personal property, excepting all delivery equipment, used in connection with the operation of the laundry located on said real property, for the period commencing November 23, 1942, and ending June 30, 1943, is $30,140.00.

[fol. 33] JUDGMENT ON DECLARATION OF TAKING NO. 1

Filed June 21, '43.

Now on this 21st day of June, 1943, this cause coming on to be heard upon the motion of Joseph T. Votava, United States Attorney in and for the District of Nebraska, and Charles D. Hitch, Special Attorney, United States Department of Justice, attorneys for the petitioner herein, to enter judgment on the declaration of taking filed in the above entitled cause on the 19th day of June, 1943, and for an order fixing the date when possession of the property herein described is to be surrendered to the United States of America, and upon consideration thereof, and of the condemnation petition filed herein, and statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said petition.

Second: That a petition in condemnation was filed at the request of the Secretary of War, the authority empowered by law to acquire the lands described in said petition, and also under authority of the Attorney General of the United States.

Third: That said petition and declaration of taking state the authority under which, and the public use for which said lands were taken, that the Secretary of War is the person duly authorized and empowered by law to acquire property such as is described in the petition for use in connection with the establishment of a military laundry located in the City of Omaha, Nebraska, and for such other uses as may be authorized by Congress, or by Executive Order, and is required for immediate use; and that the Attorney General of the United States is the [fol. 34] person authorized by law to direct the institution of such condemnation proceedings.

Fourth: That a proper description of the property sought to be taken, sufficient for identification thereof, is set out in said declaration of taking.

Fifth: That said declaration of taking contains a statement of the estate or interest in the said property taken for said public use.

Sixth: That a plat showing the property taken is incorporated in said declaration of taking.

Seventh: That a statement is contained in said declaration of taking of a sum of money estimated by said acquiring authority to be just compensation for said property in the amount of $30,140.00 for the period ending June 30, 1943, and that said sum was deposited in the Registry of this Court for the use of the persons entitled thereto, upon and at the time of the filing of said declaration of taking.

Eighth: That a statement is contained in said declaration of taking that the amount of the ultimate award of compensation for the taking of said property in the opinion of the Secretary of War will be within any limits prescribed by Congress as to the price to be paid therefor.

Now, therefore, it is ordered, adjudged and decreed that the title to an estate for a term for years ending June 30, 1943 in the property above referred to, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken, or subsequent extensions thereof, vested in the United States of America upon the filing of said declaration of taking, and the depositing in the Registry of this Court of the amount of the estimated just compensation, which said property situated in Douglas County, Nebraska is more particularly described in Schedule "A", attached hereto and made a part hereof; and

That said property is deemed to have been condemned and taken for the use of the United States of America and the right to just compensation for the property taken, [fol. 35] upon the filing of the declaration of taking, and making of the deposit, vested in the persons entitled there-

to, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law; and

It is further ordered, adjudged and decreed that possession of the above described property and of the buildings and appurtenances thereto annexed, together with all personal property located on said real property and used in connection with the operation of the laundry located in the City of Omaha, Nebraska, excepting all delivery equipment, shall be surrendered to the United States of America and its duly authorized agents forthwith.

It is further ordered that this cause is held open for such further orders, judgments and decrees as may be necessary in the premises.

(Signed U. S. D. Judge.)

[fol. 36] SCHEDULE "A"

Description:

The East 22 feet of Lot 7, all of Lot 8, and a strip of land one foot wide adjoining the North side of said real estate, all in Block 171, Original City of Omaha, Douglas County, Nebraska, containing .26 of an acre, more or less.

The gross sum estimated to be just compensation for the real property hereby taken, and for the condemnation of the personal property, excepting all delivery equipment, used in connection with the operation of the laundry located on said real property, for the period commencing November 23, 1942, and ending June 30, 1943, is $30,140.00.

[fol. 37] ANSWER OF
KIMBALL LAUNDRY COMPANY
Filed Aug. 23, 1943.

Comes now the defendant and in answer to the petition of the plaintiff alleges that:

I

The defendant, Kimball Laundry Company, was incorporated to own and operate a laundry and dry cleaning

business in Omaha. It was so doing on November 21, 1942, and was the sole owner thereof. On that date all its property essential for its continuation in business was condemned and taken from it by the plaintiff. Its land, and the building and machinery thereon, are referred to in the petition. The going business of the defendant was condemned and taken over by plaintiff when the land and building and machinery were taken. The entire business is now operated by plaintiff. Said going business, though taken by plaintiff and continuously operated by it, is neither described nor referred to in the petition. The defendant had no other assets necessary for the operation of its business, except those taken by the plaintiff. The plaintiff provided defendant with no money as compensation for the taking of its property and made no partial deposit in court on the purchase price thereof. On June 21, 1943, plaintiff tendered in court for defendant $30,140 as rent to June 30, 1943. This defendant rejected because designated as rent for temporary use.

II

Defendant's property on November 21, 1942, was free from all encumbrances, liens, easements, leaseholds, or right to use any part thereof by any other person. All [fol. 38] taxes were paid. The business was in a sound financial conditions. Defendant owed no bills except the then current accounts which it has since paid. Thus, no other person has any interest in defendant's property and defendant's rights in this case regarding the same.

III

The defendant's business at the time of the taking thereof consisted of a five-story brick, tile, and reinforced steel, fireproof, modern building, fully equipped with all necessary machinery and supplies to carry on a first-class general laundry and dry cleaning business. The business of defendant was located upon a tract of land owned in fee by defendant in the principal business district of the City of Omaha fronting 88 feet on Jones Street and 133 on South Fifteenth Street, with a net land area of 11,645

square feet. The present premises were especially designed and built in 1924 by defendant for its laundry and dry cleaning business. The business was being conducted by defendant for such purposes on its premises when on November 21, 1942, as above stated, it was all condemned and completely taken by plaintiff.

IV

Upon that date defendant was serving the people of the City of Omaha and surrounding community through these facilities, and had been continuously doing so for many years last past. Its trade and consequent income were growing steadily. It had established at a large expense customer's routes throughout the City of Omaha and suburbs, which territory has a population of about 250,000. It had built up at said time its trade and business with more than 5,000 families, business establishments, and individual customers. All these customers were denied further service by plaintiff when it took the business on said date. Each and every customer of the defendant enrolled on its books on November 21, 1942, was compeled to seek laundry and dry cleaning services elsewhere with competitive firms because of plaintiff's taking of defendant's business with all its facilities. Defendant owned and had efficiently installed all the ma- [fol. 39] chinery and equipment necessary to profitably carry on this business. This was all condemned and taken by plaintiff. Defendant had established the privilege to go upon its customers' premises and collect all types of laundry from them and bring the same to its building, and there service the same and return the serviced goods to its owners. In addition thereto, many hundreds of its customers, aggregating about 12 per cent of its total volume, came to its building and delivered their property to defendant and called for the same when the work thereon was completed.

V

Defendant's gross annual income from all its customers was approximately $400,000. For the portion of

the year 1942 prior to the taking the defendant's gross income was divided as follows:

Dry cleaning	$ 78,130.70;
Household goods, consisting of blankets, etc.	20,626.75;
Family washing:	
Rough dry,	37,065.63;
Damp wash,	40,913.13;
Flat work (sheets and pillow cases)	28,727.13;
Finished family work (shirts, collars, etc.)	45,635.34;
Bundle work for individuals	109,736.92.
	$360,835.60

All of this business was profitable to defendant on the date of taking.

VI

Plaintiff has replaced its own laundry and dry cleaning customers for all those who formerly patronized the plaintiff. Plaintiff charges and receives pay for all of the laundry and dry cleaning services that it renders for soldiers and all other enlisted men in every branch of the armed forces who may desire such service. All these soldier customers personally pay plaintiff for their laundry and dry cleaning. Said laundry is likewise operated by plaintiff to clean blankets, sheets, pillow cases, towels, bedding, cloth coverings of all kinds and descriptions, for army camps, army depots, and army training centers in this community. Charges are likewise made by plaintiff and collected from such army units for such [fol. 40] services rendered. Defendant is informed and believes that the gross income to the plaintiff from its continuous operation of said business is approximately $30,000 per month. It is growing in volume and consequent profit to the plaintiff. The gross cash income from the going business as operated by the plaintiff is approximately the same as when operated by defendant.

VIII [VII]

These facts are recited to show that plaintiff desired defendant's assets condemned, and acquired the same as

a going business. Defendant alleges that plaintiff is now attempting to pay rent therefor as just compensation and offers, by separately estimating the value of land, building, and machinery, to pay defendant rent therefor based upon an estimated percentage of the separate valuations. This plan defendant alleges is without statutory authority and is in violation of defendant's rights under the Fifth Amendment to the Federal Constitution, which insures defendant full payment for the fair, reasonable market value of all its property on the day of its taking.

VIII

Over a period of many years under the skilled direction of Harry A. Jacobberger, its President, his brothers and sons, and other employees whom they had trained, its trade had been favorably built. The cost of so doing was great; the beneficial results reflected in its increasing volume of business each year. These skilled and trained employees numbered 185; about 30 addition[al] persons, whose duties required less skill, worked for defendant at times as needed. The plaintiff took over and employed at the outset almost all of the skilled employees, including managers and foremen who were in charge for defendant at the time of the taking. This was done by plaintiff to insure the continuous operation of the defendant's business by the plaintiff. As time went on after the taking, many of the most skilled employees joined competitive firms. These skilled and long trained employees have been [fol. 41] replaced by plaintiff with less skilled employees who are capable of handling the large volume of rough laundry and dry cleaning required by plaintiff in its operations.

IX

Defendant's trade name, "Kimball Laundry Company," established by advertisements in Omaha for many years, became valueless to defendant upon the taking. The machinery and equipment is suffering hard and unusual use by the plaintiff because it operates in two shifts of eight hours in each day in parts of the plant, instead of one

eight-hour day throughout the plant as when operated by defendant.

X

The long-established telephone number used and advertised extensively with the name, "Kimball Laundry," has been discontinued by plaintiff and its own telephone numbed substituted. The taking rendered same valueless to defendant.

XI

Because of the taking by plaintiff at said time of all of defendant's business assets, defendant was damaged on November 21, 1942, in at least the amount of $949,979.40. This sum allows a credit to plaintiff of the sum of $34,875.50 which the plaintiff has paid to the defendant upon plaintiff's statement of the market value of all its laundry and dry cleaning supplies, such as soap, chemicals, buttons, thread, cartons, paper, wrappers, grease, oil, replaceable parts of machinery, and similar items on hand on November 21, 1942. These supplies were necessary for the continuous running and operation of the business by plaintiff and were taken by plaintiff to insure that result. The amount paid therefor is not in dispute, but the defendant alleges it is entitled to 6 per cent interest on said $34,875.50 from November 21, 1942, when taken, to the 8th day of July, 1943, when the payment was made, because by law provided.

XII

Said sum of $949,979.40 results also after a credit of $15,000 is given, which sum defendant estimates to be the [fol. 42] fair, reasonable market value of twenty-five "Kimball Laundry" trucks which were in use by the defendant in its business and which were rendered of no avail to the defendant when it was deprived of its business. Said trucks were left with defendant and excepted in the petition as "delivery equipment" at the time of taking by plaintiff, because plaintiff used the U. S. Army trucks for its deliveries. Fifty-four extra tires from the "Kimball Laundry" trucks were required, because of the

taking, to be surrendered to the "Defense Supply Corporation," which paid defendant $145.10 therefor. Credit has likewise been given for this sum. Said three items offset from the total valuation on November 21, 1942, aggregate $50,020.60, and to that extent reduce the sum due defendant as the fair, reasonable market value of defendant's property when condemned and taken by the plaintiff on November 21, 1942, to the sum of $949,979.40. The defendant alleges it is entitled to be paid this sum as the balance of the just compensation for the taking, with 6 per cent interest thereon from said date to the date of payment, because by law so provided.

XIII

Defendant alleges that any other plan than full payment in money to defendant as just compensation for the fair, reasonable market value of defendant's business on the date of taking, would result in depriving defendant of its property without due process of law in violation of the applicable clause of the Fifth Amendment to the Federal Constitution.

XIV

Defendant further alleges that plaintiff sought to deprive defendant of its property without due process of law contrary to said Fifth Amendment, when it tendered to the Clerk of the United States District Court for defendant's use and as full and adequate compensation, on the 21st day of June, 1943, the sum of $30,140.00, which plaintiff alleged in its tender was rent for the "temporary use of land, building, and machinery," beginning on [fol. 43] the 22nd day of November, 1942, and ending on June 30, 1943. At the time of its tender the plaintiff extended its right to possession and operation of said business to June 30, 1944, with authority in law to continue thereafter. Said sum deposited for rental defendant alleges was based upon no statutory authority; nor was said sum as tendered based upon any agreement or consent of the defendant to permit plaintiff to temporarily use its property and pay rent therefor. Consequently, the tender of "rent" is rejected by defendant. The plain-

tiff has been and now is in full possession and ownership of all the business assets of defendant, and is operating by virtue thereof the laundry and dry cleaning establishment formerly owned and operated by defendant. Therefore, defendant alleges it was and is entitled to be paid the full value thereof as a going concern on the day of taking.

XV

Defendant further alleges that under the provisions of Sec. 171, Title 50 U. S. C. A., p. 121, the Secretary of War was authorized to condemn any land or "temporary use thereof or other interest therein or right pertaining thereto, needed for the site, location, construction, prosecution of works for fortifications, coast defense, military training camps, etc." Nowhere in said original Act was the Secretary of War empowered to acquire a going business and pay rent for the same in the absence of a voluntary agreement with the owner. The words, "temporary use," referred to in said Statute enabled the Secretary of War to acquire a lease or a "temporary use" that the condemnee may have had in property or some part thereof that was needed by the condemnor.

XVI

Defendant further alleges that in the amendment to said Sec. 171, Title 50 U. S. C. A., Pocket Part for use during 1943, p. 181, passed on March 27, 1942, as Sec. 632 under the title of "Real Property for War Purposes," the term, "'real property and all interests therein," was amended to read, "together with any personal property located thereon or used therewith." Defendant alleges that [fol. 44] in said amendment there is no authority given plaintiff to pay rent for real estate and personal property located thereon or used therewith without the owner's consent. This amendment, upon which plaintiff relies in its petition, required, upon condemnation, full pay for any and all property acquired at the fair, reasonable market value thereof, with provisions enacted in other sections that after its ownership by the government was

no longer required, the plaintiff in the condemnation proceedings or the President of the United States was authorized to sell the property back to the former owner at its fair, reasonable market value at the time of its return. (Sec. 722, Title 50 U. S. C. A., Pocket Part for use during 1943, p. 199, Ch. 445, 55 Stat. 742. Amended as to limitations to December 31, 1944, and thereafter until the duration of the war, Sec. 645, Title 50 U. S. C. A., Pocket Part for use during 1943, p. 195, March 27, 1942, and as amended on June 5, 1942, Sec. 775, Title 50 U. S. C. A., Pocket Part for use during 1943, p. 205.) These statutory provisions provided the exclusive remedy for the measurement of the net and final results to the plaintiff for the condemnation. (Sec. 632, Title 50 U. S. C. A., 1943, p. 181.)

XVII

Defendant further alleges that Secs. 257, 258, and 258(a), 40 U. S. C. A., and the Nebraska Statute in reference to condemnation, Ch. 83, Art. 16, C. S. N. 1929, provided the procedure. Nowhere therein is provision made for measuring the basis for rental of property owned in fee by a defendant without such fee owner's consent. In the absence of consent, condemnation and outright purchase and payment of the fair, reasonable market value at the time of taking is the procedure provided.

XVIII

Defendant further alleges, as hereinabove stated, that the defendant held no "temporary use" to any part of any of the property taken by plaintiff. Defendant owned its property outright and was operating it in unison as a going concern in a specialized business. The plaintiff's condemnation was not of a "temporary use of real es-[fol. 45] tate or personal property located thereon or used therewith," because the defendant's ownership therein was absolute, not temporary. The property was all parts of a going business concern then owned outright by defendant. Defendant, therefore, had no "temporary use" of the property acquired by plaintiff. The condemnation that took place upon the filing of the peti-

tion resulted in the acquiring of defendant's title to all its business assets by plaintiff, for which defendant shall be paid the just compensation therefor as provided in the said Fifth Amendment.

Wherefore, the defendant, Kimball Laundry Company, a corporation, prays that it be awarded judgment in condemnation against plaintiff for the fair, reasonable market value of all of its property as a going concern acquired, appropriated, destroyed, rendered valueless, or damaged by the plaintiff as of November 21, 1942; that said sum be fixed and determined to be not less than $949,979.40; that plaintiff be allowed credit for $34,875.50 for supplies paid for by plaintiff to defendant, and be allowed $15,000 as the fair, reasonable value of the twenty-five motor vehicles left with the defendant by the plaintiff at the time of the taking, and be allowed $145.10 for extra tires for said trucks, taken and paid for by the "Defense Supply Corporation"—all of which offsets aggregate $50,020.60; that judgment be rendered for at least the balance of $949,979.40; that the defendant be awerded 6 per cent interest on at least $949,979.40 from November 21, 1942, until paid, and also judgment for interest on $34,875.50 from November 21, 1942, to July 8, 1943; and for such other and further relief to which the defendant may be entitled, together with all costs and expenses incidental to these proceedings, for which judgment is prayed accordingly.

The defendant further prays that in the event the appraisers fail to find at least said net sum of $949,979.40 with interest as just compensation to be paid defendant [fol. 46] for its property, then upon appeal to this Court judgment may be granted for at least said sum, together with interest and the accruing costs and the expenses of such proceeding.

KIMBALL LAUNDRY COMPANY, *a Corporation,*
(Seal) By H. A. Jacobberger, President

William J. Hotz, Hotz & Hotz, by Wm. J. Hotz, Attorneys for Defendant, 1530-5 City National Bank Bldg., Omaha, Nebraska.

In the event an unacceptable award is made by the appraisers and said cause is appealed to the Court, jury trial is demanded.

WM. J. HOTZ, *Attorney for Defendant*

Service acknowledged and 2 copies hereof received on Aug. 23d, 1943.

Joseph T. Votava, By Emmet L. Murphy,
Asst. U. S. Atty., Att'y for Petitioner

[fol. 46a]

MOTION

Filed Sept. 16, '43.

Comes now the petitioner, by Charles D. Hitch, Special Attorney, United States Department of Justice, one of its attorneys, and moves the Court for an order appointing six appraisers as prayed for in the petition filed herein on November 21, 1942. (Signed U. S. D. Atty.)

[fol. 46b]

ORDER APPOINTING APPRAISERS

Filed Sept. 16, 1943.

Now on this 16th day of September, 1943, this matter coming on for hearing on the motion of the petitioner for the appointment of appraisers in said cause, and the Court being fully advised in the premises finds that the necessary parties respondent have been ascertained and that this proceeding may now go forward by the appointment of appraisers, the giving of notice, and the assessment of the compensation due to the interested parties.

In consideration of the premises, it is considered, ordered and adjudged that the following persons who are disinterested freeholders and residents of the State of Nebraska, and not more than two of whom are residents of Douglas County, Nebraska, be and they hereby are appointed appraisers of the value of the estate taken, as described in the petition in this cause, and as appraisers of the just compensation due to the owner of the property:

I. J. Dunn, Omaha, Douglas County, Nebraska.
E. E. Gilmore, Omaha, Douglas County, Nebraska.
William H. Smith, Seward, Seward County, Nebraska.
Jean R. Kinder, Lincoln, Lancaster County, Nebraska.

G. W. Steinmeyer, Beatrice, Gage County, Nebraska.
William Robertson, Plattsmouth, Cass County, Nebraska.

It is further ordered that each of said appraisers named shall be allowed as compensation as such appraiser the sum of $50.00 for each day, or part thereof, for services rendered, plus mileage, and that such sum allowed shall include the personal expenses of said appraisers.

It is further ordered that the Clerk of this Court be and she hereby is directed immediately to notify by registered [fol. 46c] letter the said appraisers appointed herein, directing them to meet at the premises involved on the 21st day of October, 1943, at 10 o'clock A. M., said date being not less than thirty (30) days nor more than forty (40) days after this date.

It is further ordered that the Clerk of this Court give notice by registered letter, not less than fifteen (15) days prior to the date of the meeting of the appraisers to the respondents herein.

It is further ordered that if a copy of such notice is properly served on the respondents herein at least ten days before the meeting of said appraisers, the same shall be sufficient in any event as to said respondents.

It is further ordered that the appraisers shall inspect and view the property involved on the day appointed in the notice for their first meeting, or on any subsequent day to which they may adjourn their first meeting, and after hearing all interested parties, the appraisers shall assess the value of the estate taken therein, and also the just compensation due to the respondent herein, as the owner of said property, and shall make a report of such assessment and compensation in writing, and file the same with the Clerk of this Court at Omaha, Nebraska, setting forth therein the number of days on which they were actually engaged in the appraisal of said property, which shall include the hearings conducted with reference to said appraisal and said report shall be filed within thirty (30) days after the date of their meeting at the premises involved herein. (Signed U. S. D. Judge.)

[fol. 46d)

NOTICE

Filed Sept. 17, 1943.

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska, Respondents.

You, and each of you, are hereby notified that the United States of America, as petitioner, has instituted an action in the United States District Court for the District of Nebraska, Omaha Division, against you, and each of you, the object and prayer of which action is the condemnation of the right to use and occupy all of the real estate, and appurtenances, and personal property of the Kimball Laundry Company, located at 1504 Jones Street, Omaha, Douglas County, Nebraska, more particularly described as follows:

(Same description as at Folio 22.)

You are further notified that the Court has appointed a Board of Appraisers to meet at the premises hereinabove described for the purpose of viewing and appraising said property, and for determining the compensation to be due and owing to each of the persons who are owners of, or who have an interest in said property, or any part thereof. That said Board of Appraisers will meet at said premises at 10 o'clock A. M., on the 21st day of October, 1943, to inspect the property involved, to appraise the same, and

[fol. 46e] The undersigned further take oath that they are not interested in the outcome of this proceeding, or in a like question, and that they will, to the best of their ability, faithfully and impartially assess the value of said property, and also the just compensation to which the respondent is entitled as the owner of said property by reason of the appropriation thereof, and that they will make a report in writing of such assessment and compensation, stating the number of days on which they actually engaged in the appraisement of said property, and fixing said compensation, together with their mileage, and that they will do and perform any and all other acts required of them, as such appraisers, according to law and the order of the Court.

(Duly signed and acknowledged by each appraiser.)

[fol. 46f] United States of America, District of Nebraska
I, Mary A. Mullen, Clerk of the United States District Court for the District of Nebraska, do hereby certify that a true copy of Order Appointing Appraisers and Notice of Meeting of Appraisers was mailed by me to the following (To each appraiser and each party.)

Filed Sept. 18, '43, and Signed by Clerk U. S. D. C.

[fol. 46h] NOTICE

Filed Sept. 22, 1943

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska, Respondents.

You, and each of you, are hereby notified that the United States of America, as petitioner, has instituted an action in the United States District Court for the District of Nebraska, Omaha Division, against you, and each of you, the object and prayer of which action is the condemnation of the right to use and occupy all of the real estate, and appurtenances, and personal property of the Kimball Laundry Company, located at 1504 Jones Street, Omaha, Douglas County, Nebraska, more particularly described as follows:

The East Twenty-Two Feet (E22') of Lot Seven (7), and all of Lot Eight (8), Block One Hundred Seventy-One (171), Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

You are further notified that the Court has appointed a Board of Appraisers to meet at the premises hereinabove described for the purpose of viewing and appraising said property, and for determining the compensation to be due and owing to each of the persons who are owners of, or who have an interest in said property, or any

part thereof. That said Board of Appraisers will meet at said premises at 10 o'clock A. M., on the 21st day of October, 1943, to inspect the property involved, to appraise the same, and to assess the compensation due [fol. 46i] to the owners thereof by reason of the taking, and condemnation of said property by the petitioner. Thereafter, the Board of Appraisers may adjourn to an appropriate place for hearing of any evidence to be submitted.

You, and each of you, may appear at the time and place designated, or at the time and place to which said Board of Appraisers may adjourn, and present evidence as to your interest in the property involved, and the value of such interest therein. This proceeding is by way of condemnation, as provided for by law, and a petition for such condemnation is on file in the office of the Clerk of the United States District Court at Omaha, Nebraska, and the details of said condemnation are set forth in said petition, which, by reference, is made a part of this notice.

Dated this 1st day of September, 1943.

(Signed U. S. D. C. Clerk.)

(Receipt of copy acknowledged Sept. 21, 1943.)

[fol. 46j] OATH OF APPRAISERS

Filed Oct. 21, 1943.

The undersigned, I. J. Dunn, of Omaha, Douglas County, Nebraska, E. E. Gilmore, of Omaha, Douglas County, Nebraska, William H. Smith, of Seward, Seward County, Nebraska, Jean R. Kinder, of Lincoln, Lancaster County, Nebraska, G. W. Steinmeyer, of Beatrice, Gage County, Nebraska, and William Robertson, of Plattsmouth, Cass County, Nebraska, appointed under an order of the Court heretofore entered in said cause to assess the just compensation to the persons entitled thereto, for the taking by the petitioner of the real estate and appurtenances, together with personal property, located at 1504 Jones Street, Omaha, Douglas County, Nebraska, more particularly described as:

The East Twenty-Two Feet (E22') of Lot Seven (7), and all of Lot Eight (8), Block One Hundred Seventy-

One (171), Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

The estate sought to be taken for said public use being a terminable estate ending June 30, 1943; and at the election of the Secretary of War for additional yearly periods thereafter for the duration of the present emergency, being first duly sworn, take oath that they are resident freeholders in the District of Nebraska; that their respective residences are as set forth herein, and that only two of said appraisers are residents of the county in which the property involved is located.

[fol. 46k] to assess the compensation due to the owners thereof by reason of the taking, and condemnation of said property by the peitioner. Thereafter, the Board of Appraisers may adjourn to an appropriate place for hearing of any evidence to be submitted.

You, and each of you, may appear at the time and place designated, or at the time and place to which said Board of Appraisers may adjourn, and present evidence as to your interest in the property involved, and the value of such interest therein. This proceeding is by way of condemnation, as provided for by law, and a petition for such condemnation is on file in the office of the Clerk of the United States District Court at Omaha, Nebraska, and the details of said condemnation are set forth in said petition, which, by reference, is made a part of this notice.

Dated this 17th day of September, 1943.

(Signed Clerk U. S. D. C.)

[fol. 47] REPORT OF APPRAISERS

Filed Nov. 19, 1943.

We, the undersigned appraisers, make our report as follows:

That heretofore by an order of this Court the undersigned were appointed as six appraisers to view the prem-

ises hereinafter described, and to hear the evidence of the value thereof, and to ascertain the full compensation due the owners thereof by reason of the taking and appropriation by the United States of America of the use and occupancy of the following described property, to-wit:

The East Twenty-Two Feet (E22') of Lot Seven (7), and all of Lot Eight (8), Block One Hundred Seventy-One (171), Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

Said property to be taken for a public use for the period fixed by the order and supplemental order of the Court heretofore entered herein.

We, the undersigned appraisers, being disinterested resident freeholders of the District of Nebraska, and only two of us being residents of Douglas County, Nebraska, in which said County said real estate and personal property is situated, and none of us being interested in the same, or like questions, as are presented in this cause of action, and we, the undersigned investigating Board of Appraisers, to assess just compensation for the taking of the use of the property above described for the term fixed in said order and supplemental order, and to view the property hereinbefore described, have heretofore made and executed our written oath as appraisers that we will, to the best of our ability, faithfully and impartially assess just compensation for the property appropriated, which oath was duly taken and subscribed to and sworn to, as more fully appears in the files of this cause.

[fol. 48] We, the undersigned appraisers, further report that due and legal notice, as prescribed by law, was given to all parties having or claiming to have any right, title or interest in and to the property hereinbefore described, all of which fully appears by the files in this action.

We, the said appraisers, further report that as required by the order of this Court, and as shown in the notice to all parties herein, met on said premises at 10 o'clock A. M. on the 21st day of October, 1943, and proceeded to view the property herein involved, as hereinbefore described, and after having examined said premises, we proceeded to hear the testimony of all parties, and after having given all parties the right and opportunity to introduce evidence and to be heard on the law and the facts with reference to the claims involved in this case, and particularly as to the value of the use of the property sought to be condemned, do hereby duly make and enter this award on the date hereinafter set forth.

We, the undersigned appraisers, find that we have jurisdiction of all the parties and the subject matter of this action; that we have complied with all provisions of the law and the orders of the Court entered herein appointing us as such appraisers. We, the said appraisers, find that the just compensation for the value of the use of the premises taken by the United States of America is the sum of $74,940.00 per annum, or the sum of $6,245.00 per month, and we find that said monthly rental was payable on the 21st day of each and every month, commencing on the 21st day of November, 1942, and that all delinquent monthly rentals shall bear interest at the rate of five per cent per annum until paid, to be paid said respondent, Kimball Laundry Company, by the United States of America.

We, the said appraisers, hereby further report that the undersigned appraisers recognize that at the time of the return of said property to the respondent there will be a damage for the loss of patrons, but a majority of said Board find that the same cannot at this time be appraised, and that this Board has no jurisdiction to anticipate such damage.

We, the said appraisers, further report to the Court that we have spent the time and traveled the number of miles in making the appraisal of the above described property in the amount and number of days and mileage set forth opposite our names herein:

[fol.49] Omit time schedule. 8 days each.)
(Signed by each appraiser.)

[fol. 50] NOTICE OF APPEAL
Filed Dec. 1, 1943.

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska.

You are hereby notified that the petitioner, the United States of America, hereby appeals from the award of the Board of Appraisers, the original of which award was heretofore filed in this cause on the 19th day of November, 1943, being the Report of Appraisers. Said report was filed in the office of the Clerk of the United States District Court in and for the District of Nebraska, Omaha Division, and awarded Kimball Laundry Company the sum of $74,940.00 per annum or the sum of $6,245.00 per month, with interest on all delinquent monthly rentals at the rate of 5% per annum until paid, as rental.

You are further notified that petitioner appeals from each item of said award.

You are further notified that this appeal will be set for hearing at the next term of the United States District Court in and for the District of Nebraska, Omaha Division, trial will be had and such proceedings taken as by law provided.

(Signed U. S. D. Atty.)

(Service ack. Dec. 1, '43, by Attys. for Respondents.)

[fol. 51] NOTICE OF APPEAL
Filed Dec. 11, 1943.

To: The United States of America and its Attorneys of Record, Joseph T. Votava, United States District Attorney for the District of Nebraska, and Charles D. Hitch, Special Attorney, United States Department of Justice.

You and each of you are hereby notified that the above designated respondent, Kimball Laundry Company, a corporation, files this its appeal from the award of the Board of Appraisers appointed by the United States District Court, as shown in the report of the appraisers in the

records and files in this cause, which report and award was filed herein on the 19th day of November, 1943, for the reason that the said respondent is aggrieved by the findings, conclusions, and awards of said appraisers in that the same are contrary to the facts and the law in such cases made and provided. Respondent will seek hearing at the earliest time and term available, or at the next term of the United States District Court in and for the District of Nebraska, Omaha Division, wherein trial and hearing will be had and the errors in said findings, proceedings, and award of said appraisers will be corrected and proper judgment and orders entered, as in such cases made and provided. Respondent will also seek the assessment of its costs, expenses, and interest at 6 per cent against petitioner, as in such cases made and provided, and such other and further relief as the Court may deem just in the premises.

(Signed Atty. for Respondent. Service ack. Dec. 7, '43, by U. S. D. Atty.)

[fol. 52] MOTION TO TAX COSTS

Filed Dec. 11, 1943.

Comes now Kimball Laundry Company, respondent above named, and moves the Court to enter an order taxing as costs against the petitioner in this case the following items which were necessarily incurred by the respondent because of the filing of the petition of taking by the petitioner herein. Each of the items hereinafter mentioned was solely and only required because the respondent was placed upon the defensive and was required as a matter of procedure to make known to the petitioner and to the board of appraisers the items that made up the property condemned, taken, and damaged by the petitioner. The nature of the business, which was a going and operating laundry and dry cleaning establishment, was necessarily on a different basis for the purpose of acquisition and appraisal than land, for example, because here was condemned and taken by the Government a going and operating business, which taking involved the destruction and the resulting damages to the re-

spondent. The Government's witnesses and appraisers, the corps of engineers, and others had no information or data in their possession or control except that which was demanded and furnished them by the respondent. Accordingly, the following sums expended by the respondent solely and only because of the petition of taking of the petitioner should be taxed as an element of costs and damages with interest at 6 per cent from the date of the respective payments, and the same ordered paid by the United States District Court herein:

[fol. 53] 1. The Lloyd-Thomas Company, for appraisal check issued February 8, 1943 ..... $1,614.19
2. Mrs. Edna McFarland, Court Reporter, check issued November 6, 1943 ..... 37.50
3. Mr. C. J. Campbell check issued November 15, 1943 ..... 100.00
4. Mr. H. F. Goodwin check issued November 23, 1943 ..... 100.00
4. John Latenser & Sons check issued December 2, 1943 ..... 447.28
6. C. L. Hillmer Company check issued December 2, 1943 ..... 430.00
7. T. H. Maenner Company check issued December 3, 1943 ..... 240.00
8. Harry Judd check issued December 9, 1943 ..... 174.00

Total $3,153.97

Explanation of the Foregoing Items of Expense

1. The Lloyd-Thomas Company: Complete itemization and appraisal of the real and personal property, giving costs and replacement values of all of the items. Copies of the report were furnished to and used by the petitioner and the Government witnesses.
2. Mrs. Edna McFarland: Court reporter fees for the reporting of testimony before the board of appraisers. This amount constitutes the one-half that was paid by the respondent, the petitioner already having paid the remaining one-half.

3. Mr. C. J. Campbell: Formerly chief counsel for the Public Works Administration. Mr. Campbell is experienced in many condemnation proceedings and explained the application and workability of the Nebraska decisions. This was made necessary because of the absence of instructions and other legal interpretations before the board.
4. Mr. H. F. Goodwin: An expert on the valuation of laundry and dry cleaning machinery and equipment. Heretofore he worked and compiled data with the Government's witnesses, with the result that the exact market value of the machinery and equipment condemned and taken by the Government was definitely arrived at as of the date of the taking.
5. John Latenser & Sons: The original architects when the building of the Kimball Laundry Company was built and the additions made thereto. This firm produced the original records of cost, produced the cost of the construction of said building as of November 21, 1942, and furnished the appraisers with sound evidence of the value of the building. The firm's records and information were used also by the witness for the United States Government.

[fol. 54] 6. C. L. Hillmer Company: The accounting firm for the Kimball Laundry Company from the time the building was built up to date. The firm furnished the appraisers with summaries of annual audits. The appraisers were offered the opportunity to obtain from this witness any of the files, records, and accounts of the Kimball Laundry Company for their inspection, and he offered to compile them and submit them. This was accordingly done and the reports used before the appraisers.

7. T. H. Maenner Company: Mr. Maenner, an expert in real estate appraisals, made an exhaustive study and report of the valuation of the real estate and buildings in order to confirm the evidence on the fair, reasonable market value on the land and building at the time of the taking. This was essential to a determination of the facts.

8. Harry Judd: A certified public accountant who has specialized in the appraisal of laundry businesses for other courts in Nebraska. He made an analysis of the value of the damages for the loss of the business as a going concern figuring the number of patrons and the amounts paid in and the different classifications of patrons for the appraisers.

In addition to the foregoing there was the testimony of other laundrymen, superintendents, auditors, and the officials of the respondent company who have made no charge for their services in testifying before the board.

All of the foregoing accounts paid, designated 1 to 8, inclusive. In addition to the personal appearance of the witnesses on the stand and the examination by the board of these witnesses, copies of the exhibits were made for each of the appraisers and for the petitioner.

In addition to the foregoing there will be the expense of the compilation and certification of the transcript of the proceedings before the board of appraisers, the cost of which will be certified and shown on the transcript of the record, and for which costs and expense of the record and transcript respondent likewise moves for the allowance as having been occasioned solely by the involuntary taking under the condemnation proceedings herein. This record and transcript is being prepared under Secs. 83-1604 and 74-310-11, C. S. N. 1929, which sections the respondent alleges are applicable and directory under Title 40, U. S. C. A., Secs. 257 and 258 as amended.

Wherefore, the respondent moves that the foregoing items be awarded as damages occasioned by the taking and judgment be entered therefor in favor of the respondent against the petitioner, wih interest thereon on the respective items at 6 pr cent from the respective dates of payment.

(Signed Attys. for Respondent. Service accepted by U. S. D. Atty. Dec. 11, '43.)

[fol. 55] PETITION IN ERROR

Filed Dec. 18, 1943.

Comes now the Respondent, Kimball Laundry Company, a corporation, and states to the Court that:

(a) Notice of appeal has been filed herein within the time provided by law from the award of the appraisers filed herein on November 19, 1943, by each the Petitioner and the Respondent.

(b) The Respondent refers to and makes a part hereof all of the pleadings and files and orders entered in the above entitled cause, as all of them were submitted to the Board of Appraisers, as shown by the record herein.

(c) The evidence, both oral and documentary, introduced by both Petitioner and Respondent at the hearing before the Board of Appraisers, was recorded by an official federal court reporter, and certified transcript thereof has been or will be filed herein within the sixty-day period permitted by law (83-1604; 74-310-11, Comp. St. Neb. 1929. Sec. 257, 258, T. 40 U. S. C. A.).

The Respondent petitions the Court to grant as a matter of law the following judgments and orders and correct the award of the Appraisers because of the following errors and omissions appearing of record in the proceedings before the said Board of Appraisers, to wit:

I

(a) To enter judgment herein against Petitioner for its costs and expenses incurred at the hearing before the Board of Appraisers, as an element of the damages sustained by Respondent because the law required the Respondent to appear before the Board and make known the resulting damages to it from the enclosed taking, which necessitated the expenditure of $3,153.97.

[fol. 56] (a) A separate motion is on file in this case itemizing this expense.

II

To award 6 per cent interest on all judgments entered herein from the time of the taking until paid, because 6 per cent is the statutory interest rate in Nebraska where all the property was located and is recoverable as a matter of law on all awards and judgments as a part of the just compensation guaranteed Respondent.

III

To grant additional damages as a matter of law in the form of interest at 6 per cent on $34,875.50, the value of personal property in the nature of supplies forcibly taken from Respondent by the Petitioner on November 21, 1942, and paid for by the Government on July 8, 1943. Interest on the sum so paid aggregated $1,395.02 from November 21, 1942, to July 8, 1943. Further interest until paid should be ordered paid by this Court, as a matter of law.

IV

(a) To enter judgment on the record as a matter of law against the Petitioner for the fair, reasonable market value of its entire property when and as taken, irrespective of how described or limited in the petition as to temporary use in part, because Respondent was damaged by the complete appropriation of all its assets. The resulting damages, in the amount of at least $949,979.40 with 6 per cent interest thereon from said date until paid, is the proper and undisputed valuation appearing of record.

(b) *Explanation:* The record made before the Appraisers and now properly before this Court (83-1604; 74-310-11 Comp. St. Neb. 1929) discloses conclusively that:

(1) Said sum was the fair, reasonable market value of the property taken. Its patronage was completely destroyed at said time by the Petitioner.

(2) Petitioner sought to and did enter the laundry and dry cleaning business by condemnation and the appropriation of Respondent's business as a going con-
[fol. 57] cern; Petitioner is now engaged therein with Respondent's formerly owned assets.

(3) Said going business and assets were fairly valued before the Board of Appraisers at $949,979.40 after allowing all credits for payments made.

(4) The record discloses no evidence to the contrary.

(5) The evidence to sustain the said sum was legally sufficient, as shown by the record.

(6) The same was requested as the award by the Respondent and was erroneously omitted by the Board for the erroneous reason given in the award.

(7) No other award was legal or sufficient under the evidence and law.

(8) The award as made was erroneously granted for some other purpose, i.e., for alleged "rent" of the "building and machinery" of Respondent.

(9) There exists no law to sustain such an award for "rent" as returned on November 19, 1943.

(10) Respondent as a matter of law is entitled to just compensation.

(11) Just compensation may be measured only in dollars and cents and must be in an amount equal to the fair and reasonable selling value at the time of the taking.

(12) The record made before the Appraisers and before this Court discloses that sum to be at least $949,979.40 as a matter of fact.

(13) Consequently, this Court may and should as a matter of law award judgment for said amount on the undisputed record of at least that valuation, with interest at 6 per cent from November 21, 1942, until paid.

V

To correct the award of the Board of Appraisers as filed herein on November 19, 1943, and enter an award [fol. 58] based upon the just compensation of at least $949,979.40, conclusively appearing of record, because the Board in its award erroneously concluded without any evidence of proof or law to sustain its award, as follows:

"We the said appraisers, find that the just compensation for the value of the use of the premises taken by the United States of America is the sum of $74,940.00 per annum, or the sum of $6,245.00 per month, and we find that said monthly rental was payable on the 21st day of each and every month, commencing on the 21st day of November, 1942, and that all delinquent monthly rentals shall bear interest at the rate of five percent per annum until paid, to be paid said respondent, Kimball Laundry Company, by the United States of America."

VI

To correct the award and enter judgment on the record requested in paragraph IV above, where it appears by said record that:

(a) There was no evidence submitted to the Board of Appraisers of any rental value.

(b) Rental or the amount thereof was not legally in issue before the Board of Appraisers under the Fifth Amendment to the Federal Constitution guaranteeing just compensation for the taking.

(c) There exists no judicial power nor statutory authority of law under the Fifth Amendment to the Constitution of the United States that would empower the Appraisers to affix rental of Respondent's business and assets taken and destroyed, as just compensation.

(d) There exists no authority under Nebraska condemnation procedure, statutes, nor the State Constituttion which legally authorizes any award except in money for the full fair, reasonable market value of the property taken and that destroyed with it by the taking on the date of taking.

(e) Said attempt to award a monthly rental was erroneous as a matter of law under Federal and Nebraska law.

(f) This Court is empowered to enter judgment for the said sum of at least $949,979.40 and 6 per cent interest when said sum appears as the proper valuation, in order that said award may comply with the constitutional and statutory requirements and the decisions of the courts interpreting the same.

[fol. 59] VII

(a) To correct the award by entering judgment herein as a matter of law for at least $949,979.40 and interest, because the competent evidence of record before the Board of Appraisers disclosed that $400,000.00 thereof was the fair valuation for the damage resulting from the taking on November 21, 1942. Upon that date the damage to the Respondent's trade, patronage, and business income directly occasioned by the taking on November 21,

1942, was $400,000.00, and the record so discloses without dispute. The appraisers erred when they sought to meet and recognize this $400,000.00 element of damage in their award by finding:

"We, the said appraisers, hereby further report that the undersigned appraisers recognize that at the time of the return of said property to the respondent there will be a damage for the loss of patrons, but a majority of said Board find that the same cannot at this time be appraised, and that this Board has no jurisdiction to anticipate such damage."

(b) There existed no proof to defeat the Respondent's competent evidence that the element of damages referred to last above was any other figure than $400,000.00. This appears from the record made before the Appraisers and now before this Court.

(c) The Appraisers having failed to make said award or include it in a total amount as a matter of law, this Court may now enter judgment on the records and files that were before the Appraisers as by law provided and now before this Court for review and correction, as by statute provided, and thus fulfill the requirements of the Federal Constitution relating to just compensation.

VIII

To correct the award of the Appraisers and enter judgment in favor of the Respondent against the Petitioner in accordance with the undisputed evidence as shown by the record before the Appraisers and now before this Court, in which record conclusively was shown the separate values of the building, the lands, the machinery and equipment, and the business as a going concern, each separately and competently evaluated, and to enter judgment on the record accordingly for the aggregate of at least $949,979.40 with interest from the day of taking.

[fol. 60] IX

To deny as a matter of law by proper order of this Court the claim in the petition of the Petitioner and relied upon by the Appraisers as shown in their award, wherein it is assumed that the Government may legally

appropriate the going business of the Respondent and carry on that same business for the Government's own use and benefit and do so without Congressional Act, but instead rely for authority upon the congressional statute referred to in the petition for the appropriation of land and personal property thereon.

X

To correct the errors appearing upon the facts, records, and files herein and award judgment forthwith upon the record for the complete appropriation of Respondent's assets, unlawfully and erroneously taken by the Government on November 21, 1942, with interest at 6 per cent, and to so adjudge the matter irrespective of the erroneous allegations of the petition, because the undisputed and competent record evidence now before this Court officially proves without further proof or hearing that a complete appropriation had taken place which justifies as a matter of constitutional law an immediate judgment for the proven values so appropriated, converted, and destroyed, of at least $949,979.40 on the said date of taking.

XI

To enter such orders and judgments herein based upon the record and files now before this Court that will compel the Petitioner herein to follow the established law of condemnation by paying for the property taken with that destroyed by the taking and at the time of the taking.

XII

To grant Respondent the first right to re-purchase said property in its then condition at the time Petitioner desires to give up the laundry and dry cleaning business now carried on by it (Sec. 1(b), Act 7/2/40; 54 St. 712; Title 50, U. S. C. A. Sec. 722; 55 St. 742) because: (1) such procedure alone is provided by statute in condem-
[fol. 61] nation cases as the measure of ultimate payment and credit to the Petitioner when such property as herein described is condemned and forcibly taken from an absolute owner such as the Respondent herein; (2) such orders and judgments alone will satisfy the Fifth

Amendment protecting and limiting just compensation, as interpreted and defined by the Judicial Branch of the Government, for both condemnor and condemnee.

XIII

(a) To correct the said award of the Appraisers, because provision has been made in the Internal Revenue Code, 1942 (Sec. 112(f); 22(d)(6), for the treatment by the Treasury of money paid by the Government to condemnees; such as Respondent herein, for damages for involuntary conversion of its property.

(b) The fund derived as pay under the just compensation clause of the Constitution for the property taken and destroyed by the taking, must be reported to the Collector of Internal Revenue under Government Form 1114, and the funds shall then be construed as a *Replacement Fund* (statutory language) to re-establish the condemnee in the same business taken forcibly by the condemnation.

(c) No capital gain or income tax may be assessed against Respondent herein under the protection of said Revenue Statute, providing the Court herein enters proper orders and judgments for at least $949,979.40 as the value shown by the record, because that sum is the fair, reasonable market value of the property taken and destroyed or damaged by the taking, and represents pecuniarily the same sum of money which the Internal Revenue Code, as well as the general law, recognizes as necessary to place Respondent in the same condition financially after the taking as before.

(d) Respondent is entitled to the benefits of the said provisions of said Revenue Act cited. The Appraisers' award denies this benefit by erroneously awarding "rent" and erroneously postponing to an indefinite future date further awards for damages that may be appraised only at the time of taking under the law.

[fol. 62] (e) As the award of the Appraisers erroneously denies the Respondent a Replacement Fund free from federal taxation, the Respondent is deprived of its property without due process of law in further violation of the Fifth Amendment to the Federal Constitution.

Wherefore, Respondent, Kimball Laundry Company, prays the Court to enter the following judgments and orders as a matter of law, based upon the pleadings and files herein and upon the certified record of the oral and documentary evidence and proceedings before the Board of Appraisers, to wit:

(1) A judgment for at least $949,979.40 with 6 per cent interest thereon from November 21, 1942, until paid, and a finding in support of said judgment that the record discloses conclusively that said sum was the fair, reasonable market value of the Respondent's land, building, machinery, equipment, and the damages for the destruction of the Respondent's going business as a direct result of the taking on said date.

(2) A judgment for 6 per cent interest on $34,875.50, which was the value of the supplies taken by the Petitioner on November 21, 1942, and not paid for by the Government until July 8, 1943, and to enter said judgment as a matter of law upon the record and a finding of this Court accordingly.

(3) An order of this Court finding as a matter of law, based upon the record herein, that the damages by destruction of the Respondent's business as a going concern was $400,000.00 and that said sum be included in the said aforementioned sum of $949,979.40 damages, and a finding upon the record as a matter of law that said element of damage occurred to the Respondent on the date of the taking, to wit, November 21, 1942, and a further finding correcting the error of record shown by the report of the Appraisers recognizing such damage but erroneously deferring the same.

(4) An order of this Court finding that the Appraisers erred in their attempt to affix rental of Respondent's land, building, and machinery at $75,940.00 per year or any other sum, and the entering of a conclusion by this [fol. 63] Court that such finding of rental denies the Respondent the just compensation guaranteed by the Fifth Amendment to the Constitution of the United States and the Constitution of Nebraska.

(6) A judgment for costs as an element of damages in the amount of $3,153.97, plus the accruing costs and the costs of the record of the proceedings before the Board of Appraisers and for such other and further orders and judgments as the Court may deem just in the premises, and for the additional costs and expenses necessarily incurred by the Respondent in the defense of its constitutional rights herein.

Dated at Omaha, Nebraska, this 18th day of December, 1943.

(Signed, Attys. for Respondent. Service ack. by U. S. D. Atty.)

[fol. 64] APPEAL UNDERTAKING

Duly filed Dec. 18, 1943, and surety approved by U. S. D. Judge, and copy received and acknowledged by U. S. D. Atty. on same date.

[fol. 65] APPLICATION OF RESPONDENT TO WITHDRAW FUNDS

Filed Feb. 1, 1944.

In the above entitled condemnation proceedings the petition alleged that the taking on November 21, 1942, was for temporary use, and the petitioner paid to the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, on June 19, 1943, the sum of $30,140.00 and designated the same as rent for temporary use from November 23, 1942, to June 30, 1943, as more particularly set forth in its petition and the records and files herein.

The respondent, Kimball Laundry Company, in later proceedings before the Board of Appraisers and by answer filed and by petition in error from said Board, has joined issue in said matter with the petitioner and has denied the right or authority of the petitioner to translate just compensation into rental, and asserts that the taking by the petitioner of the respondent's property has constituted an appropriation to be fully compensated in damages as of the date of taking, as more particularly set forth in its answer and petition in error on file herein.

The respondent is desirous of withdrawing said funds without prejudice and without reference to said withdrawal as a matter of evidence against the respondent in the proceedings before the Court; nor as an acceptance nor as an admission by the respondent or an acquiescence in the position taken by the petitioner in reference to said matter, as above alleged, save and except that said funds so withdrawn shall apply as a credit against the award, whtever the same may be, finally determined by the Court.

Wherefore, the respondent prays for an order of this Court authorizing the withdrawal by the respondent of the sum of $30,140.00 on deposit with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, without prejudice to the position taken by the respondent as shown by the pleadings and files herein and not as an admissi n nor an acceptance by the respondent of the position taken by the petitioner herein in making said tender, save and except that said sum may be credited upon the final award of the Court in this matter.

Dated at Omaha, Nebraska, this 1st day of February, 1944.

(Signed Attys. for Respondent.)

[fol. 66]

ORDER

Filed Feb. 1, 1944.

This matter coming on for hearing upon the application of the respondent for the right to withdraw a deposit of $30,140.00 made with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, on the 19th day of June, 1943, and the same having been so deposited by the petitioner as rental for temporary use of the respondent's property; and the respondent, as shown by the pleadings and files herein, having joined issue with the petitioner by denying the right of the petitioner to pay rent for temporary use in lieu of damages as compensation at the time of taking; and it appearing that said issues in said proceedings are before this Court for determination, together with other issues involved in

said cause; and it appearing that said funds might be withdrawn by the respondent without prejudice to its rights and without prejudice to the rights of the petitioner,

It is therefore ordered that the respondent, Kimball Laundry Company, may withdraw said sum of $30,140.00 so deposited on June 19, 1943, and in so doing the same shall not be construed as an admission by the respondent of the position taken in said cause and in making said tender by the petitioner herein, and the same may be so withdrawn by the respondent without prejudice to the rights of either party, save and except that upon the final award of this Court, the said withdrawal shall be credited thereon.

Dated at Omaha, Nebraska, this 1st day of February, 1944.

(Signed U. S. D. Judge.)

The within order is approved as to form and petitioner consents to the withdrawal of the funds in the registry of the court as prayed in respondent's application.

(Signed U. S. D. Atty.)

[fol. 67] STIPULATION

Filed Mar. 25, 1944.

It is hereby stipulated by the parties herein that argument on respondents' motion to tax costs, filed herein on the 11th day of December, 1943, be continued until the conclusion of said cause in this court.

(Signed by Attys. for both sides.)

[fol. 68] ORDER

Filed March 25, 1944.

The stipulation of the parties with reference to the continuation of a Motion filed by the defendant to tax costs coming on for consideration before the Court, and in consideration thereof,

It is now and hereby ordered that the said Motion be and the same is hereby overruled without prejudice to the defendant to renew said Motion upon the conclusion of a trial in this Court.

Dated: This 26th day of March. A. D. 1944.

(Signed U. S. D. Judge.)

[fol. 69] REQUEST FOR PRETRIAL HEARING

Filed April 3, 1944.

To: The Honorable James A. Donohoe:

Counsel for respondent, Kimball Laundry Company, requests the pretrial procedure permissible under F. R. C. P. No. 16. The case involves questions for the Court's decision in a Condemnation Proceedings. The respondent waived jury trial.

The opposing counsel is the United States District Attorney. Service of this request has been made upon him.

Dated April 3, 1944. Signed by Attys. for Respondent. Service ack. by U. S. D. Atty.

[fol. 70] SUPPLEMENTAL DECLARATION OF TAKING

Filed April 6, 1944.

Whereas, I have elected to extend the term for years which was condemned in this proceeding for an additional term of one year commencing July 1, 1943 and ending June 30, 1944; and

Whereas, the sum estimated to be just compensation for the taking of said extension term of one year is not included in the monies heretofore deposited with this court in this proceeding.

Now therefore, I, Henry L. Stimson, Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1943 and ending June 30, 1944, to be $50,000.00, which sum I cause to be deposited herewith in the registry of this Honorable Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner by its Secretary of War thereunto authorized has caused this Supplemental Declaration of Taking to be signed in its name and on its behalf by said Secretary of War this the 23d day of March, A. D. 1944, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 71] JUDGMENT ON SUPPLEMENTAL DECLARATION OF TAKING

April 6, 1944.

Now, on this 6th day of April, 1944, this matter coming on for hearing upon the motion of Joseph T. Votava, United States Attorney in and for the District of Nebraska, and Charles D. Hitch, Special Attorney, Department of Justice, attorneys for the petitioner herein, to enter judgment on the supplemental declaration of taking filed in the above entitled cause on the 6th day of April, 1944, and upon consideration thereof, and of the condemnation petition filed herein, and the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said petition.

Second: That a petition in condemnation was filed at the request of the Secretary of War, the authority empowered by law to acquire the property described in said petition, and also under authority of the Attorney General of the United States.

Third: That on the 21st day of June, 1943, there was filed herein declaration of taking, under the terms of which an estate for a term for years ending June 30, 1943, in the property therein described, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, vested in the

United States of America, and on the same day there was deposited in the registry of this court the sum of [fol. 72] $30,140.00 as the estimated just compensation for the term from November 23, 1942 to June 30, 1943, and on the same day a judgment on said declaration of taking was entered in this proceeding.

Fourth: That on May 11, 1943, the petitioner filed in this proceeding a motion to extend the term condemned for an additional year ending June 30, 1944, and on the same day the Court entered its order extending said term and there was filed herein a notice of such extension.

Fifth: That said petition and declaration of taking stated the authority under which and the public use for which said property was taken; that the Secretary of War is the person duly authorized and empowered by law to acquire property such as is described in the petition for use in connection with the establishment of a military laundry located in the City of Omaha, Nebraska, and for such other uses as may be authorized by Congress or by Executive Order, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings.

Sixth: That a proper description of the property sought to be taken, sufficient for identification thereof, is set out in the declaration of taking.

Seventh: That said declaration of taking contains a statement of the estate or interest in the property taken for said public use.

Eighth: That a plat showing the property taken is incorporated in said declaration of taking.

Ninth: That a statement is contained in said supplemental declaration of taking of a sum of money estimated by said acquiring authority to be just compensation for the use and occupancy of said property for the term commencing July 1, 1943 and ending June 30, 1944 in the amount of $50,000.00, and that said sum was deposited in the registry of this court for the use of the persons entitled thereto.

Tenth: That said supplemental declaration of taking contains a statement that the amount of the ultimate

award for said extension term, in the opinion of the Secretary of War, will probably be within any limits prescribed by law as the price to be paid therefor.

[fol. 73] Now, therefore, it is ordered, adjudged and decreed that said judgment on declaration of taking No. 1, filed herein on June 21, 1943, be, and the same is, continued in full force and effect as extended for an additional yearly period ending June 30, 1944, with the additional deposit of money as herein set forth for the extension term of one year commencing July 1, 1943 and ending June 30, 1944.

(Signed U. S. D. Judge.)

[fol. 74] APPLICATION OF RESPONDENT TO WITHDRAW FUNDS

Filed April 13, 1944.

In the above entitled condemnation proceedings the petition alleged that the taking on November 21, 1942, was for temporary use, and the petitioner paid to the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, the sum of $50,000.00 and designated the same as rent for temporary use from July 1, 1943, to June 30, 1944.

The respondent is desirous of withdrawing said funds without prejudice and without reference to said withdrawal as a matter of evidence against the respondent in the proceedings before the Court; nor as an acceptance nor as an admission by the respondent or an acquiescence in the position taken by the petitioner in reference to said matter, as above alleged, save and except that said funds so withdrawn shall apply as a credit against the award, whatever the same may be, finally determined by the Court.

Wherefore, the respondent prays for an order of this Court authorizing the withdrawal by the respondent of the sum of $50,000.00 on deposit with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, without prejudice to the position taken by the respondent as shown by the pleadings and files

herein and not as an admission nor an acceptance by the respondent of the position taken by the petitioner herein in making said tender, save and except that said sum may be credited upon the final award of the Court in this matter.

Dated at Omaha, Nebraska, this 11th day of April, 1944.

(Signed by Attys. for K. L. Co. Service ack. by U. S. D. Atty.)

[fol. 75]

ORDER

Filed April 13, 1944.

This matter coming on for hearing upon the application of the respondent for the right to withdraw a deposit of $50,000.00 made with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, in April, 1944, and the same having been so deposited by the petitioner as rental for temporary use of the respondent's property; and the respondent, as shown by the pleadings and files herein, having joined issue with the petitioner by denying the right of the petitioner to pay rent for temporary use in lieu of damages as compensation at the time of taking; and it appearing that said issues in said proceedings are before this Court for determination, together with other issues involved in said cause; and it appearing that said funds might be withdrawn by the respondent without prejudice to its rights and without prejudice to the rights of the petitioner,

It is therefore ordered that the respondent Kimball Laundry Company, may withdraw said sum of $50,000.00 so deposited in April, 1944, and in so doing the same shall not be construed as an admission by the respondent of the position taken in said cause and in making said tender by the petitioner herein, and the same may be so withdrawn by the respondent without prejudice to the rights of either party, save and except that upon the final award of this Court, the said withdrawal shall be credited thereon.

Dated at Omaha, Nebraska, this 13th day of April, 1944.

(Signed U. S. D. Judge.)

The within Order is approved as to form, and Petitioner consents to the withdrawal of the funds in the Registry of the Court as prayed in Respondent's application. (Signed U. S. D. Atty.)

[fol. 76] RESPONDENT'S MOTION TO ADVANCE CAUSE FOR FINAL DISPOSITION

Filed May 2, 1944.

Comes now the Kimball Laundry Company and moves the Court to expedite the final disposition and the obtaining of a final award in the above-entitled case by entering all necessary orders to accomplish said purpose forthwith, for the following reasons:

I

The Kimball Laundry Company recognizes the right and the existing necessity of the Executive Branch to take its property for the statutory purposes. The condemnation and resulting immediate taking was accomplished on November 21, 1942, concerning which taking no complaint is made.

II

The Respondent, however, challenges the Court's attention to facts arising after the taking and asserts that the application of the constitutional provision for just compensation has now become the sole and exclusive function of the Judicial Branch. Further, Respondent challenges the Court's attention to the established law that the Department of Justice is not authorized to prescribe a formula or theory of valuation of property sought to be condemned by the United States which the Court is required to accept in fixing just compensation to the owner. The Petitioner, now acting through the Department of Justice, has adopted a course which, unless promptly corrected, will deprive Respondent of its property without just compensation and which will place Respondent in a most disadvantageous position from which it may never be able to extricate itself.

III

The facts upon which the Respondent bases this Motion for immediate final disposition of this cause in order to forestall injustice, are in the main as follows:

(a) On November 21, 1942, the Respondent, Kimball Laundry Company, owned outright without encumbrance or any other outside interest therein, the absolute fee title to the building and real estate. The building had at said time, exclusive of real estate, a fair, reasonable market value, based upon the very best kind of competent evidence, of $280,348.00. The land was appraised additionally at $25,000.00. The building was equipped with removable laundry and dry cleaning machinery and equipment which had a fair, reasonable market value at said time of $273,831.39. It had supplies on hand necessary for the continuous operation of said business as a going concern of $34,875.50. At said time it was doing a gross business of approximately $400,000.00 per year with 15,000 customers built up from 1925 to the date of the taking at a very large expense. Its customers consisted of the principal commercial accounts in the downtown City of Omaha, b sides family and individual account. The Kimball Laundry Company had received in gross [fol. 77] cash income from its laundry and dry cleaning business from 1925 to November 21, 1942, $5,958,796.93. The greatest annual gross revenue in its history was in the year immediately preceding the taking. Such established business had a fair, reasonable market value of not less than $400,000.00 under the standard, competent, and acceptable rules governing valuations of such businesses. Thus, the total fair value of Respondent's assets on November 21, 1942, was $1,014,054.89.

(b) The Petitioner by the taking acquired all parts of the land and the building and all parts of the machinery and equipment, and totally destroyed immediately at the taking all the Respondent's business and all the income therefrom, and in its place substituted therefor the Petitioner's own laundry and dry cleaning business. To accomplish this result Petitioner kept and maintained

said plant as a going concern in all of its departments, largely with Respondent's former skilled employees. Petitioner charged soldiers for such laundry and dry cleaning services $313,408.86 and collected that sum from soldiers during the first nine months of the Army Quartermaster Corps operations, and is continuing said business as a going concern.

(c) The Respondent, Kimball Laundry Company, had no other or different facilities for the operation of its laundry and dry cleaning business to service its trade and consequently since November 21, 1942, has been completely out of business, and its business has been completely destroyed as a direct result of the taking.

(d) The Government has thus far paid in cash $34,875.50 on July 8, 1943 for the supplies on hand such as soap, cleansing chemicals, etc., $30,140.00 on June 19, 1943; and $50,000.00 on April 13, 1944.

(e) Each of these sums so received on account has been reported to the Collector of Internal Revenue for the Omaha District under Form 1114 in which, under Sec. 112f of the Internal Revenue Code, Respondent claims said money for the purpose of establishing a replacement fund. Instead, because of the Petitioner's stand that it is only "renting" the laundry, the Internal Revenue Agent in Charge at Omaha has on the first deposit of $34,875.55 demanded an income tax of $9,786.72, on the grounds that the same was income and therefore taxable as such rather than as an exempt replacement fund.

(f) The question of federal income taxation becomes one of paramount importance to the Respondent in that the prompt determination of the issues in the condemnation proceedings, if decided as prayed by the Petitioner, will place said funds under the tax exemptions provision of Sec. 112f of the Internal Revenue Code.

(g) Furthermore, prompt decision herein is most essential because the personal property is subject to excessive destruction because of the unusual wear and tear made necessary by the style and the kind of laundrying and dry cleaning done by the Petitioner for the United States Army. There exists no standard or precedent for

"rental" of such machinery and equipment. Payment therefor at the fair, reasonable market value of said machinery and equipment at the time of the taking with the privilege of repurchase from the replacement fund by the Respondent at the fair, reasonable market value, is the only method for just compensation provided by law. The plan, obviously, of Petitioner is to use said machinery and equipment as long as desired by the Quartermaster Corps and then to abandon said entire premises to Respondent, with the consequent irreparable damage to Respondent—all of which plan of Petitioner is contrary to law.

(h) Furthermore, it has recently developed that the huge boilers necessitated in this type of laundry and there installed, have become unsafe from the overburdened use made of them by the Petitioner. The result is that the boilers have become dangerous to life and property. The insurance company which has carried the boiler insurance served written notice on the "Kimball Laundry Company" on April 20, 1944, that it would be no longer re- [fol. 78] sponsible under the terms of its insurance policy because of such condition. This important matter calls for prompt decision of the issues herein, as Respondent denies all responsibility therefor. This Motion is notice thereof.

(i) Much of the other machinery and equipment has become totally incapacitated from the severe and heavy uses necessitated. Petitioner refuses to recognize or consider such important matter at this time, assorting that "rent" covers wear and tear, well-knowing the same to be legally unsound.

(j) All the employees, aggregating some 180, skilled in the operation of said laundry and who were part of the operating company of the Kimball Laundry Company on November 21, 1942, have for the most part gone elsewhere and have been substituted by Government employees of the United States Army Quartermaster Corps, and all of Respondent's customers and trade have gone to competitive establishments.

IV

The Petitioner, well-knowing that there existed no measure for pay for temporary use of such property as this type of machinery and equipment; well-knowing that said equipment would be put to most unusual and excessive wear and tear, due to the stress of war demands, and the consequent destruction of much of said machinery and equipment; well-knowing that Petitioner desired a going concern; well-knowing that the taking would destroy directly the entire business of the Kimball Laundry Company; well-knowing that the only source of income was the customers which would all be driven away by the taking—nevertheless adopted an illegal course by filing a petition which stated that said property was taken for "temporary use." The Petitioner well knew that such procedure could not possibly give to the Respondent the just compensation provided by the Constitution of the United States; and if delay is further tolerated, the results to Respondent will be the abandonment of the property by the Quartermaster Corps, the effort of Petitioner to renounce all claims in this action for the very large resulting damages, and the attempt to relegate the redress for this grievance to a Court of Claims for Damages. This stand has been repeatedly announced by attorneys for Petitioner as its proposed course.

V

The Respondent moves that the matter be set for determination before this Court promptly, because Petitioner delayed approximately one year before calling the Board of Appraisers and then obtained an order referring said matter to the Appraisers only on the basis of "rental." Nevertheless, the Appraisers in their reports and findings stated that the Respondent's business was destroyed by the taking, for which the Kimball Laundry Company was entitled to just compensation. The Petitioner refused to permit the Appraisers to determine the amount, although the evidence was and is of record of all values, and the same has been certified and filed with the Clerk of this Court for use in this cause.

Wherefore, Kimball Laundry Company prays this Court for an order that will forthwith bring this cause for prompt trial and for the immediate determination of the issues presented by a Petition in Error filed by Respondent which should determine all the issues in the case, including the amount of compensation for the taking, because the valuations are practically the same as given by the witnesses for both Petitioner and Respondent.

Dated May 1; 1944. (Signed Attys. for K. L. Co.)

Service ack. U. S. D. Atty.

[fol. 79] NOTICE

Filed May 31, 1944.

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska.

You, and each of you, are hereby notified that the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned in the real and personal property described in Exhibit "A" attached hereto and made a part hereof, to June 30, 1945, since the use and possession of such properties will be required for military purposes for an additional year.

You are further notified that the Secretary of War has elected to extend the term which was condemned in said real estate for an additional year ending June 30, 1945.

Dated this 31st day of May, 1944.

(Signed U. S. D. Atty.)

[fol. 80] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 81] MOTION TO EXTEND TERM CONDEMNED

Filed May 31, 1944.

Whereas, on November 21, 1942 there was filed herein a petition for the condemnation of an estate for years ending June 30, 1943 on the real and personal property described in Exhibit "A", attached hereto, and made a part hereof, and

Whereas, an order for immediate possession was entered in said cause on November 21, 1942 giving the peti-

tioner immediate possession of said property, and by notice duly filed the term condemned was extended for an additional year ending June 30, 1944, and

Whereas, the petitioner is now, and has been since the entry of said order, in possession of the real estate and personal property involved herein, and

Whereas, the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year ending June 30, 1945, and has elected so to do, and

Whereas, the Secretary of War notified the Attorney General of his election to extend said term and requested that proper notice of such extension be filed herein and a copy thereof be transmitted to each interested party, and

Whereas, the Attorney General has instructed the United States Attorney for the District of Nebraska to carry out the request of the Secretary of War, and

Whereas, a notice of the extension of the term has been filed herein.

Now, therefore, petitioner moves the court for an order [fol. 82] extending the term which was condemned in said real and personal property and confirming and extending the possession thereof in the United States for an additional year ending June 30, 1945.

(Signed U. S. D. Atty.)

[fol. 83] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 84] ORDER ON MOTION TO EXTEND TERM

Filed May 31, 1944.

Now, on this 31st day of May, 1944, this cause came on to be heard on the motion of the petitioner herein for an order extending the term condemned in said cause, and the evidence, and was submitted to the court, and the court being advised in the premises finds:

That on November 21, 1942 there was filed herein a petition for the condemnation of an estate for years ending June 30, 1943 on the real estate and personal property hereinafter described, and that on said day an order

for immediate possession of said property was entered herein, and that by a notice duly filed in this proceeding the term condemned was extended for an additional year ending June 30, 1944.

That by virtue of said order the petitioner has been since said time and is now in the possession of the property involved herein and described in Exhibit "A".

That the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year ending June 30, 1945, and has elected so to do.

That the Secretary of War has requested the Attorney General, who has instructed the United States Attorney for the District of Nebraska to file notice of such election and to transmit a copy hereof to each interested party, and that such notice has been filed in this proceeding.

Wherefore, it is considered, ordered and adjudged that the term in the real estate and personal property described in Exhibit "A", attached hereto, and made a part hereof, which was condemned and possession thereof given [fol. 85] petitioner in the order entered on November 21, 1942, be and the same hereby is extended for an additional year ending June 30, 1945, and the possession of the petitioner of said property is hereby confirmed and extended for a like period ending June 30, 1945.

(Signed U. S. D. Judge.)

[fol. 86] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 87] AFFIDAVIT OF MAILING ORDER AND MOTION TO EXTEND TERM

Filed June 5, 1944, by U. S. D. Atty.

[fol. 88] SUPPLEMENTAL DECLARATION OF TAKING

Filed Aug. 10, 1944.

To the Honorable The United States District Court:

Whereas, I have elected to extend the term for years which was condemned in this proceeding for an additional term of one year commencing July 1, 1944 and ending June 30, 1945; and

Whereas, the sum estimated to be just compensation for the taking of said extension term of one year is not included in the monies heretofore deposited with this court in this proceeding.

Now, therefore, I Henry L. Stimson, Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1944, and ending June 30, 1945, to be $50,000.00, which sum I cause to be deposited herewith in the registry of this Honorable Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner by its Secretary of War thereunto authorized has caused this Supplemental Declaration of Taking to be signed in its name and on its behalf by said Secretary of War this 26th day of July, A. D. 1944, in the City of Washington, District of Columbia.

Henry L. Stimson, Secretary of War of the United States.

[fol.89] JUDGMENT ON SUPPLEMENTAL DECLARATION OF TAKING

Filed Aug. 12, 1944.

Now, on this 12th day of August, 1944, this matter coming on for hearing upon the motion of Joseph T. Votava, United States Attorney in and for the District of Nebraska and Charles D. Hitch, Special Attorney, United States Department of Justice, attorneys for the Petitioner herein to enter judgment on the supplemental declaration of taking filed in the above entitled cause on the 10th day of August, 1944, and upon consideration thereof and of the condemnation petition filed herein and the statutes in such cases made and provided and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said Petition;

Second: That a petition in condemnation was filed at the request of the Secretary of War, the authority empowered by law to acquire the property described in said petition and also under authority of the Attorney General of the United States;

Third: That on June 19, 1943, there was filed herein a declaration of taking under the terms of which an estate for a term for years ending June 30, 1943 in the property therein described, subject however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines together with the right to extend said term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War vested in the United States of America and on the same day, there was de- [fol. 90] posited in the registry of the court, the sum of $30,140 as the estimated just compensation for the term for years expiring June 30, 1943 and on the 21st day of June, 1943, a judgment on said declaration of taking was filed in the proceeding;

Fourth: That on May 11, 1943, the Petitioner filed in this proceeding a motion to extend the term for years for an additional year ending June 30, 1944 and on May 11, 1943, the Court entered its order extending said term and there was filed herein a notice of such extension;

Fifth: That on May 31, 1944, the Petitioner filed in this proceeding a motion to extend the term for years for an additional year ending June 30, 1945 and on the same day the Court entered its order extending said term and there was filed herein a notice of such extension;

Sixth: That on April 6, 1944 there was filed herein a supplemental declaration of taking under the terms of which a deposit of $50,000 was made in the registry of the court as just compensation for the taking of the property involved herein for the extension term of one year, commencing July 1, 1943 and ending June 30, 1944, and

on the same day, a judgment was entered on said supplemental declaration of taking;

Seventh: That said petition and declaration of taking stated the authority under which and the public use for which said property was taken; that the Secretary of War is the person duly authorized and empowered by law to acquire property such as is described in the petition for use in connection with the establishment of a military laundry located in the City of Omaha, Nebraska, and for such other uses as may be authorized by Congress or by Executive Order, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Eighth: That a proper description of the property sought to be taken, sufficient for identification thereof, is set out in the declaration of taking;

[fol. 91] Ninth: That said declaration of taking contains a statement of the estate or interest in the property taken for said public use;

Tenth: That a plat showing the property taken is incorporated in said declaration of taking;

Eleventh: That a statement is contained in said supplemental declaration of taking filed herein on August 10, 1944, of a sum of money estimated by said acquiring authority to be just compensation for the use and occupancy of said property for the term commencing July 1, 1944 and ending June 30, 1945 in the amount of $50,000 and that said sum was deposited in the registry of this Court for the use of the persons entitled thereto; that said supplemental declaration of taking contains a statement that the amount of the ultimate award for said extension term, in the opinion of the Secretary of War, will probably be within any limits prescribed by law as the price to be paid therefor:

Now, therefore, it is ordered, adjudged and decreed that said judgment on declaration of taking No. 1 filed herein on June 21, 1943 be and the same is continued in full force and effect as extended for an additional yearly period ending June 30, 1945 with the additional deposit

of money as herein set forth for the extension term of one year commencing July 1, 1944 and ending June 30, 1945. (Signed U. S. D. Judge.)

[fol. 92] APPLICATION OF RESPONDENT TO WITHDRAW FUNDS

Filed Aug. 18, 1944.

In the above entitled condemnation proceedings the petition alleged that the taking on November 21, 1942, was for temporary use, and the petitioner paid to the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, the sum of $50,000.00 and designated the same as rent for temporary use from July 1, 1944, to June 30, 1945.

The respondent is desirous of withdrawing said funds without prejudice and without reference to said withdrawal as a matter of evidence against the respondent in the proceedings before the Court; nor as an acceptance nor as an admission by the respondent or an acquiescence in the position taken by the petitioner in reference to said matter, as above alleged, save and except that said funds so withdrawn shall apply as a credit against the award, whatever the same may be, finally determined by the Court.

Wherefore, the respondent prays for an order of this Court authorizing the withdrawal by the respondent of the sum of $50,000.00 on deposit with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, without prejudice to the position taken by the respondent as shown by the pleadings and files herein and not as an admission nor an acceptance by the respondent of the position taken by the petitioner herein in making said tender, save and except that said sum may be credited upon the final award of the Court in this matter.

Dated at Omaha, Nebraska, this 17th day of August, 1944. (Signed Attys. for K. L. Co.)

Service ack. by U. S. D. Atty.

[fol. 93] ORDER

Filed Aug. 18, 1944.

This matter coming on for hearing upon the application of the respondent for the right to withdraw a deposit of $50,000,00 made with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, in August, 1944, and the same having been so deposited by the petitioner as rental for temporary use of the respondent's property; and the respondent, as shown by the pleadings and files herein, having joined issue with the petitioner by denying the right of the petitioner to pay rent for the temporary use in lieu of damages as compensation at the time of taking; and it appearing that said issues in said proceedings are before this Court for determination, together with other issues involved in said cause; and it appearing that said funds might be withdrawn by the respondent without prejudice to its rights and without prejudice to the rights of the petitioner.

It is therefore ordered that the respondent, Kimball Laundry Company, may withdraw said sum of $50,000 so deposited in August, 1944, and in so doing the same shall not be construed as an admission by the respondent of the position taken in said cause and in making said tender by the petitioner herein, and the same may be so withdrawn by the respondent without prejudice to the rights of either party, save and except that upon the final award of this Court the said withdrawal shall be credited thereon.

Dated at Omaha, Nebraska, this 18th day of August, 1944. (Signed by U. S. D. Judge.)

The within Order is approved as to form, and Petitioner consents to the withdrawal of the funds in the Registry of the Court as prayed in Respondent's application. (Signed U. S. D. Atty.)

[fol. 94] SECOND MOTION OF THE RESPONDENT TO ADVANCE CASE FOR TRIAL

Filed Oct. 25, 1944.

Comes now the Respondent, Kimball Laundry Company, and moves the Court that the above entitled case be set for trial at an early date during the present jury term, and in support thereof submits the following facts:

I

The Petitioner heretofore in open court has requested a jury trial. In view of the fact that at present a jury has been called and is now serving, Respondent files this Motion and makes special reference to a previous Motion to Advance for Hearing filed by the Respondent on May 2, 1944, which Motion was argued and submitted to the Court on or about June 3, 1944, at which time the Court entered an order setting the case for trial when a jury was called. The jury has now been called and is serving.

II

The Petition for taking was filed herein on November 21, 1942, at which time the Petitioner took possession of the Respondent's business, and is now and has been at all times since in possession and operation thereof.

III

A hearing before the Board of Appraisers was held approximately one year after the taking. Both Petitioner and Respondent appealed from the findings and award of the Appraisers within the time provided by law.

IV

In addition to the appeal from the Board of Appraisers filed by the Respondent a Petition in Error was filed by Respondent and is pending before this Court for review. Said Petition in Error is by reference made a part of this Motion. In said Petition in Error all the legal points involved in this action have been placed in issue. The Respondent stands ready upon one day's notice from the Court to argue orally the merits of said Petition in Error. Respondent has heretofore filed with the Clerk and submitted to the Court a brief covering the legal questions

involved, and did so September 27, 1943, and served copy of the same upon counsel for Petitioner.

V

No point has been raised in the case which in any manner challenges the right of the Petitioner to condemn and take immediate possession of Respondent's property. It was peaceably surrendered in recognition of the Petitioner's legal rights, with reliance upon this Court for prompt and immediate adjudication by judgment which when paid would place the Petitioner in the same finan- [fol. 95] cial position as before the taking, and further would be the legally recognized replacement fund guaranteed to Petitioner by law. . .

VI

The United States District Attorney has stated to counsel for Respondent as his reason for the extended delays that issues herein involved are now pending before the Supreme Court of the United States; that this cause should therefore await trial, hearing, and decision until such other case has been determined by the United States Supreme Court. Counsel for Respondent has made inquiry and finds that there is no case pending before the United States Supreme Court in which the issues are the same as in the case at bar. The case referred to by the United States District Attorney which is pending before the United States Supreme Court is probably the condemnation proceedings by the United States against General Motors Company cited in 140 F. (2) 873 (7th Circuit, opinion February 11, 1944), in which taking by the Petitioner was the temporary use of leasehold or possessory right only which the General Motors Company had for warehouse space in Chicago, Illinois. Such case involves the questions of what elements of damages may be considered by the Court in the taking of the possessory or leasehold right which was the condemnee's temporary use. Whether or not the expenses occasioned by enforced removal and the rendering valueless of bins and fixtures left behind were compensable damages, are issues in that case. The United States Circuit Court of Appeals held all such elements were compensable in cash

payment. The Government through the Assistant Attorney General, Norman M. Littell, seeks to deny these damages by reversal of the said case in the United States Supreme Court. Certiorari was granted May 29, 1944. Thus, it will not be reached for decision for several months. When it is decided, it will not, according to the reported opinion from the Circuit Court, cover the questions before this Court in the case at bar. Even so, the pendency would be no proper reason for denying Respondent herein the prompt trial to which it is entitled in the extraordinary proceedings of a condemnation case.

VII

The business of the Respondent, consisting of land, building, appurtenances, machinery, and equipment, and a complete operating laundry and dry cleaning business, has been taken by the Petitioner, for which business Respondent should have long since been paid its full fair market value as of November 21, 1942, as a complete replacement fund.

VIII

The fair, reasonable value of such going business when taken on November 21, 1942, is the only measure of just compensation for the Respondent and is guaranteed to all condemnees who were in the absolute ownership and possession of their property at the date of the taking, rather than an enforced so-called "rent" thereof for so-called temporary use tendered by Petitioner in the case at bar. Petitioner well knows that at any time it may abandon the premises and thus leave the Respondent in further position to suffer further losses with further litigation, which the law has designed to avoid by providing a replacement fund in money, rather than an imaginary "credit" by the attempted return of a destroyed business plus tendered "rent." The law makes no provision for such procedure. The Petitioner seeks, nevertheless, to place Respondent in such disadvantageous position by continuing to delay a trial on the merits.

[fol. 96] Therefore, Respondent requests the Court upon its own Motion without a hearing hereon to set this case for trial at an early date at the convenience of the Court,

because the Court has heretofore heard and determined that the Respondent was entitled to a hearing at this time. Likewise, it has been previously stated by the Court that the counsel for Petitioner must arrange their appointments in reference to the trial of the case accordingly.

Respondent requests the Court to advise the Clerk to notify respective counsel of the day set for hearing by giving at least one week's notice of such date.

Dated at Omaha, Nebraska, this 25th day of October, 1944.

(Signed by K. L. Co. Service ack. by U. S. D. Atty.)

[fol. 97] MOTION TO STRIKE CERTAIN PARTS OF RESPONDENT'S ANSWER

Filed May 12, 1945.

Comes now the petitioner and moves the court to strike from respondent's answer filed herein the following portions of said answer for the reasons hereinafter set out:

1. That portion beginning with the words "The going business" in line 1 paragraph I page 1 and ending with the words "operated by plaintiff" in line 9 of said paragraph for the reason that said language (a) pleads a conclusion of law; (b) that said language is contrary to the express provisions of the declaration of taking filed herein on June 19, 1943; (c) that said language is an attempted enlargement of the scope of said declaration without any warrant in law therefor; (d) that said language pleads matters of evidence; (e) that said portion of said answer does not constitute a defense to petitioner's action.

2. That portion of said paragraph I beginning with the words "though taken" in line 10 and ending with the words "operated by it" for the reason that said language (a) pleads a conclusion of law; (b) that said language pleads matters of evidence; (c) that said language is redundant.

3. That portion of said paragraph I beginning with the words "The defendant had" in line 12 of said paragraph and ending with the words "taken by the plaintiff"

in line 13 thereof for the reason that (a) said allegation is immaterial; (b) said language does not constitute a defense to petitioner's action; (c) said language offers no plea which constitutes an issue in this case.

4. That portion of paragraph I beginning with the words "This defendant" in line 17 and ending with the words "for temporary use" in line 18 for the reason that said allegation is immaterial.

5. All of paragraph II beginning on page 1 and ending [fol. 98] on page 2 for the reason that (a) the same is immaterial; (b) it raises no issue in this case; (c) it pleads no facts in issue herein; (d) it constitutes no defense to petitioner's action; (e) it pleads matters wholly extraneous to the issue herein.

6. All that part of paragraph III page 2 beginning with the words "The defendant's business" in line 1 of said paragraph and ending with the words "on its premises" in line 11 for the reason (a) that said allegations are immaterial; (b) that said language pleads matters of evidence; (c) that said allegations constitute no defense to petitioner's action.

7. That part of said paragraph III beginning with the words "when on November 21" in line 11 and ending with the words "taken by plaintiff" in line 13 for the reason that (a) said allegation is a conclusion of law; (b) said allegation is a plea of matters of evidence; (c) said allegation constitutes no defense to plaintiff's action.

8. All that part of paragraph IV page 2 beginning with the words "upon that date" in line 1 of said paragraph and ending with the words "with competitive firms" in lines 12 and 13 for the reason that (a) said allegations are immaterial; (b) said allegations constitute no defense to petitioner's action.

9. That part of paragraph IV in line 13 thereof reading "because of plaintiff's taking of defendant's business" for the reason that (a) said language pleads a conclusion of law; (b) that said language is contrary to the express provisions of the declaration of taking filed herein on June 19, 1943; (c) that said language is an attempted enlargement of the scope of said declaration without any

warrant in law therefor; (d) that said language pleads matters of evidence; (e) that said language does not constitute a defense to petitioner's action; (f) that said allegation is immaterial.

10. All that part of paragraph IV beginning with the words "Defendant owned and had" in line 14 of said paragraph to the end of said paragraph IV for the reason (a) that said allegations are immaterial; (b) that said allegations neither raise nor meet any issues in this case; (c) that said allegations are surplusage; (d) that said allegations constitute no defense to petitioner's action.

[fol. 99] 11. All of paragraph V except the last sentence thereof for the reason that (a) said allegations are immaterial; (b) said allegations plead matters of evidence; (c) said allegations are mere surplusage; (d) said allegations constitute no defense to petitioner's action.

12. The last sentence of paragraph V for the reason (a) that said allegation is immaterial; (b) that said allegtion is surplusage; (c) that said allegation constitutes no defense to petitioner's action.

13. All of paragraph VI for the reason (a) that the allegations of said paragraph VI are immaterial; (b) the allegations of said paragraph are mere surplusage; (c) the allegations of said paragraph constitute no defense to petitioner's action; (d) the allegations of said paragraph neither meet nor raise any issues involved herein.

14. All of paragraph VII for the reason (a) that the allegations of said paragraph are immaterial; (b) that the allegations of said paragraph are surplusage; (c) that the allegations of said paragraph constitute no defense to petitioner's action.

15. That part of paragraph VIII on page 4 of said answer beginning with the words "Over a period" in line 1 and ending with the words "time of taking" in line 10 for the reason (a) that the allegations therein contained are immaterial; (b) that the allegations are surplusage; (c) that said allegations neither meet, raise nor present any issue involved herein; (d) that said alle-

gations are redundant; (e) that said allegations constitute no defense to petitioner's action.

16. That part of paragraph VIII beginning with the words "This was done" in line 11 and ending with the words "by the plaintiff" for the reason (a) that said allegation is immaterial; (b) that said allegation pleads a conclusion of law; (c) that said allegation pleads matter of evidence; (d) that said allegation constitutes no defense to petitioner's action.

17. That part of paragraph VIII beginning with the words "As time went on" in line 12 thereof, to the end of said paragraph VIII on page 5 for the reason (a) that said allegations are immaterial; (b) that said allegations neither meet nor present any issue herein; (c) that said allegations are mere surplusage; (d) that said allegations constitute no defense to petitioner's action.

[fol. 100] 18. All of paragraph IX page 5 for the reason (a) that the allegations therein contained are immaterial; (b) that said allegations neither present, raise nor meet any issue involved herein; (c) that said allegations are surplusage; (d) that said allegations constitute no defense to petitioner's action.

19. All of paragraph X page 5 of said answer for the reason (a) that the matter set forth therein is immaterial; (b) that said allegations constitute no defense to plaintiff's action; (c) that said allegations are mere surplusage; (d) that said allegations neither raise, meet nor present any issue involved herein.

20. That part of paragraph XI page 5 beginning with the words "Because of the taking" in line 1 and ending with "the amount of $949,979.40" in line 3 for the reason (a) that said allegation pleads a conclusion of law; (b) that said allegation pleads matter of evidence; (c) that said allegation is not specific; (d) that said allegation is indefinite and uncertain.

21. That part of paragraph XI beginning with the words "This sum allows" in line 3 and ending with the words "insure that result" in line 11 for the reason (a) that said allegations are immaterial; (b) that said alle-

gations are mere surplusage; (c) that said allegations constitute no defense to petitioner's action.

22. That part of paragraph XI beginning with the words "The amount paid" in line 11 and ending with the words "by law provided" in line 14 for the reason (a) that said portion of said paragraph pleads a conclusion of law; (b) that said allegations are immaterial.

23. All of paragraph XII beginning on page 5 and ending on page 6 for the reason (a) that the allegations therein contained are immaterial; (b) that said allegations are matters of evidence; (c) that said allegations constitute no defense to petitioner's action.

24. All of paragraph XIII page 6 for the reason (a) that said paragraph is immaterial; (b) that said paragraph pleads a conclusion of law; (c) that said language is an attempted enlargement of the scope of the declaration of taking filed herein on June 19, 1943, without any warrant in law therefor; (d) that the allegations in said paragraph constitute no defense to petitioner's action herein.

[fol. 101] 25. That part of paragraph XIV page 6 beginning with the words "Defendant further alleges" in line 1 and ending with the words "rejected by defendant" in lines 8 and 9 for the reason (a) that said allegations plead conclusions of law; (b) that said allegations are immaterial.

26. That part of paragraph XIV page 7 beginning with the words "The plaintiffs has been" in line 9 page 7 to the end of said paragraph for the reason (a) that said allegations plead a conclusion of law (b) that said language is contrary to the express provisions of the declaration of taking filed herein on June 19, 1943; (c) that said language is an attempted enlargement of the scope of said declaration without any warrant in law therefor; (d) that said allegations plead matters not in issue.

27. All of paragraph XV page 7 for the reason (a) that said paragraph pleads conclusions of law; (b) that said paragraph is argumentative merely; (c) that said allegations constitute no defense to petitioner's action;

(d) that said paragraph is immaterial and mere surplusage.

28. All of paragraph XVI beginning on page 7 and ending on page 8 for the reason (a) that said paragraph pleads conclusions of law; (b) that said paragraph is argumentative merely; (c) that said allegations constitute no defense to petitioner's action; (d) that said paragraph is immaterial and mere surplusage.

29. All of paragraph XVII on page 8 for the reason (a) that said paragraph pleads conclusions of law; (b) that said paragraph is argumentative merely; (c) that said paragraph is immaterial and mere surplusage; (d) that said allegations constitute no defense to petitioner's action.

30. That part of paragraph XVIII page 8 beginning with the words "Defendant further alleges" in line 1 and ending with the words "specialized business" in line 4 for the reason (a) that said allegations are immaterial; (b) that said allegations constitute no defense to petitioner's action.

31. That part of paragraph XVIII beginning with the words "The plaintiff's condemnation" in line 5 to the end of said paragraph XVIII for the reason (a) that said allegations are immaterial; (b) that said allegations plead conclusions of law; (c) that said allegations are merely argumentative.

[fol. 102] 32. All of respondent's prayer for the reason (a) judgment is prayed for on erroneous conclusions of law; (b) judgment is prayed for in a specified amount whereas respondent is entitled to a judgment in such amount as may be awarded by verdict of a jury in a trial de novo; (c) the last paragraph of said prayer presupposes a judgment may be entered by the court on failure of appraisers to award the amount demanded by respondent whereas, under the law, the only judgment to which respondent is entitled is one based on a jury's verdict on a trial de novo or a trial to the court on consent of both parties.

(Signed by U. S. D. Atty.)
Service ack. May 12, '45, by Atty. for K. L. Co.)

[fol. 103] NOTICE OF HEARING ON MOTION
Filed May 12, 1945

Duly signed and served and ack. Hearing set for May 17, 1945, at 9:30 A. M.

[fol. 104] MOTION TO STRIKE PETITION IN ERROR AND TRANSCRIPT OF EVIDENCE
Filed May 17, 1945.

Comes now the petitioner and moves the court to strike from the files and records of the court respondent's petition in error and transcript of evidence before the board of appraisers filed herein, for the reasons that:

1. They are incompetent, irrelevant and immaterial.
2. There is no provision in the law under which their filing is permissible in cases such as the case at bar.
3. Under the law this cause on appeal must be tried de novo.
4. The court is without jurisdiction to entertain the petition in error

(Signed U. S. D. Atty.)

[fol. 105] NOTICE
Filed May 28, 1945.

To: Kimball Laundry Company, a Corporation, and County Treasurer of Douglas County, Nebraska.

You, and each of you, are hereby notified that the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned in the real and personal property described in Exhibit "A" attached hereto and made a part hereof, to June 30, 1946, since the use and possession of such property will be required for military purposes for an additional year.

You are further notified that the Secretary of War has elected to extend the term which was condemned in said real estate for an additional year ending June 30, 1946.

Dated this 28th day of May, 1945.

(Signed U. S. D. Atty.)

[fol. 106] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 107] MOTION TO EXTEND TERM CONDEMNED

Filed May 28, 1945.

Whereas, on November 21, 1942, there was filed herein a petition for the condemnation of an estate for years, ending June 30, 1943, on the property described in Exhibit "A" attached hereto and made a part hereof, and

Whereas, an order for immediate possession was entered in said cause on November 21, 1942, giving the petitioner immediate possession of said property, and

Whereas, the petitioner is now and has been since the entry of said order in possession of the property involved herein, and

Whereas, the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year, ending June 30, 1946, and has elected so to do, and

Whereas, the Secretary of War notified the Attorney General of such election and requested that proper notice of such election be filed herein and a copy thereof be transmitted to each interested party, and

Whereas, the Attorney General has instructed the United States Attorney for the District of Nebraska to carry out the request of the Secretary of War, and

Whereas, a notice of such election to extend has been filed herein.

[fol. 108] Now, therefore, the petitioner moves the Court for an order extending the term which was condemned in said real estate and personal property and confirming and extending the possession thereof in the United States for an additional year, ending June 30, 1946.

(Signed U. S. D. Atty.)

[fol. 109] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 110] ORDER ON MOTION TO EXTEND TERM

Filed May 28, 1945.

Now, on this 28th day of May, 1945, this cause came on to be heard on the motion of the petitioner herein for an order extending the term condemned in said cause, and the evidence, and was submitted to the Court, and the Court being advised in the premises, finds:

That on November 21, 1942, there was filed herein a petition for the condemnation of an estate for years ending June 30, 1943, on the real estate and personal property hereinafter described, and that on said day an order for immediate possession of said property was entered herein, and that by a notice duly filed in this proceeding the term condemned was extended for an additional year ending June 30, 1944, and was again extended for an additional year ending June 30, 1945.

That by virtue of said order the petitioner has been since said time and is now in the possession of the property involved herein and described in Exhibit "A".

That the Secretary of War deems it necessary and advantageous to the interests of the United States to extend the term condemned for an additional year ending June 30, 1946, and has elected so to do.

That the Secretary of War has requested the Attorney General, who has instructed the United States Attorney for the District of Nebraska to file notice of such election and to transmit a copy thereof to each interested party, and that such notice has been filed in this proceeding.

Wherefore, it is considered, ordered and adjudged that the term in the real estate and personal property described in Exhibit "A", attached hereto, and made a part hereof, which was condemned and possession thereof [fol. 111] given petitioner in the order entered on November 21, 1942, be and the same hereby is extended for an additional year ending June 30, 1946, and the posses-

sion of the petitioner of said property is hereby confirmed and extended for a like period ending June 30, 1946.

(Signed U. S. D. Judge.)

[fol. 112] EXHIBIT "A"

(Same description as at Folio 22.)

[fol. 113] AFFIDAVIT OF MAILING

Filed June 1, 1945, showing service by mail of Motion and Order Extending Term to June 30, 1946, duly signed and acknowledged by U. S. D. Atty. to all parties.

[fol. 114] SUPPLEMENTAL DECLARATION OF TAKING

Filed Aug. 8, 1945.

To the Honorable, The United States District Court:

Whereas, I have elected to extend the term for years which was condemned in this proceeding for an additional term of one year commencing July 1, 1945, and ending June 30, 1946; and

Whereas, the sum estimated to be just compensation for the taking of said extension term of one year is not included in the monies heretofore deposited with this court in this proceeding.

Now, therefore, I, Robert P. Patterson, Acting Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1945, and ending June 30, 1946, to be $65,000.00, which sum I cause to be deposited herewith in the registry of this Honorable Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner by its Acting Secretary of War thereunto authorized has caused this Supplemental Declaration of Taking to be signed in its name

and on its behalf by said Robert P. Patterson, Acting Secretary of War this the 16th day of July, 1945, in the City of Washington, District of Columbia.

ROBERT P. PATTERSON,
Acting Secretary of War of the United States

[fol. 115] JUDGMENT ON SUPPLEMENTAL DECLARATION OF TAKING

Filed Aug. 8, 1945.

Now, on this 8th day of August, 1945, this matter coming on for hearing upon the motion of Joseph T. Votava, United States Attorney in and for the District of Nebraska, and Charles D. Hitch, Special Attorney, United States Department of Justice, attorneys for the Petitioner herein, enter judgment on the supplemental declaration of taking filed in the above entitled cause on the 8th day of August, 1945, and upon consideration thereof and of the condemnation petition filed herein and the statutes in such cases made and provided and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said Petition:

Second: That a petition in condemnation was filed at the request of the Secretary of War, the authority empowered by law to acquire the property described in said petition and also under authority of the Attorney General of the United States;

Third: That on June 19, 1943, there was filed herein a declaration of taking under the terms of which an estate for a term for years ending June 30, 1943, in the property therein described, subject however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines together wih the right to extend said term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War vested in the United States of America, and on the same day, there was deposited in the Registry of the Court, the sum of $30,140 as the estimated just compensation for the term for years expiring

June 30, 1943, and on the 21st day of June, 1943, a judgment on said declaration of taking was filed in the proceeding;

Fourth: That on May 11, 1943, the Petitioner filed in this proceeding a motion to extend the term for years for an additional year ending June 30, 1944, and on May 11, 1943, the Court entered its order extending said term and there was filed herein a notice of such extension;

[fol. 116] Fifth: That on May 31, 1944, the Petitioner filed in this proceeding a motion to extend the term for years for an additional year ending June 30, 1945, and on the same day the Court entered its order extending said term and there was filed herein a notice of such extension;

Sixth: That on May 28, 1945, the Petitioner filed in this proceeding a motion to extend the term for years for an additional year, ending June 30, 1946, and on the same day the Court entered its order extending said term, and there was filed herein a notice of such extension.

Seventh: That said petition and declaration of taking stated the authority under which and the public use for which said property was taken; that the Secretary of War is the person duly authorized and empowered by law to acquire property such as is described in the petition for use in connection with the establishment of a military laundry located in the City of Omaha, Nebraska, and for such other uses as may be authorized by Congress or by Executive Order, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Eighth: That a proper description of the property sought to be taken, sufficient for identification thereof, is set out in the declaration of taking;

Ninth: That said declaration of taking contains a statement of the estate or interest in the property taken for said public use;

Tenth: That a plat showing the property taken is incorporated in said declaration of taking;

Eleventh: That a statement is contained in said supplemental declaration of taking, filed herein on August

8th, 1945, of a sum of money estimated by said acquiring authority to be just compensation for the use and occupancy of said property for the term commencing July 1, 1945, and ending June 30, 1946, in the amount of $65,000.00, and that said sum was deposited in the registry of this court for the use and benefit of the persons entitled thereto; that said supplemental declaration of taking contains a statement that the amount of the ultimate award for said extension term, in the opinion of the Secretary of War, will probably be within any limits prescribed by law as the price to be paid therefor.

Now, therefore, it is ordered, adjudged and decreed that said judgment on declaration of taking No. 1, filed herein on June 21, 1943, be and the same is continued in full force and effect as extended for an additional yearly [fol. 117] period ending June 30, 1946, with the additional deposit of money as herein set forth for the extension term of one year, commencing July 1, 1945, and ending June 30, 1946.

(Signed U. S. D. Judge.)

[fol. 118] APPLICATION OF RESPONDENT TO WITHDRAW FUNDS

Filed Aug. 11, 1945.

In the above entitled condemnation proceedings the petition alleged that the taking on November 21, 1942, was for temporary use, and the petitioner paid to the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, the sum of $65,000.00 and designated the same as rent for temporary use from July 1, 1945, to June 30, 1946.

The respondent is desirous of withdrawing said funds without prejudice and without reference to said withdrawal as a matter of evidence against the respondent in the proceedings before the Court; nor as an acceptance nor as an admission by the respondent or an acquiescence in the position taken by the petitioner in reference to said matter, as above alleged, save and except that said funds so withdrawn shall apply as a credit against

the award, whatever the same may be, finally determined by the Court.

Wherefore, the respondent prays for an order of this Court authorizing the withdrawal by the respondent of the sum of $65,000.00 on deposit with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, without prejudice to the position taken by the respondent as shown by the pleadings and files herein and not as an admission nor an acceptance by the respondent of the position taken by the petitioner herein in making said tender, save and except that said sum may be credited upon the final award of the Court in this matter.

Dated at Omaha, Nebraska, this 11th day of August 1944. (Signed K. L. Co. Attys.)

Service ack. by U. S. D. Atty.

[fol. 119] ORDER

Filed Aug. 11, 1945.

This matter coming on for hearing upon the application of the respondent for the right to withdraw a deposit of $65,000.00 made with the Registry of Court, Clerk of the United States District Court, at Omaha, Nebraska, in August, 1945, and the same having been so deposited by the petitioner as rental for temporary use of the respondent's property; and the respondent, as shown by the pleadings and files herein, having joined issue with the petitioner by denying the right of the petitioner to pay rent for the temporary use in lieu of damages as compensation at the time of taking; and it appearing that said issues in said proceedings are before this Court for determination, together with other issues involved in said cause; and it appearing that said funds might be withdrawn by the respondent without prejudice to its rights and without prejudice to the rights of the petitioner,

It is therefore ordered that the respondent, Kimball Laundry Company, may withdraw said sum of $65,000.00 so deposited in August, 1945, and in so doing the same shall not be construed as an admission by the respondent of the position taken in said cause in making said tender

by the petitioner herein, and the same may be so withdrawn by the respondent without prejudice to the rights of either party, save and except that upon the final award of this Court the said withdrawal shall be credited thereon.

Dated at Omaha, Nebraska, this 11th day of August, 1945. (Signed U. S. D. Judge.)

The within Order is approved as to form, and Petitioner consents to the withdrawal of the funds in the Registry of the Court as prayed in Respondent's application.

(Signed U. S. D. Atty.)

[fol. 120] THIRD WRITTEN MOTION OF THE RESPONDENT, KIMBALL LAUNDRY COMPANY, TO ADVANCE CASE FOR TRIAL

Filed Jan. 18, 1946.

Comes now the respondent, Kimball Laundry Company, and moves the Court to set the above-entitled cause for trial and to call the jury for such purpose any time but not later than February 11, 1946, for the following reasons, to wit:

1. A pretrial was had herein on May 17, 1945, and the legal propositions proposed by the respondent for determination were at that time submitted to the Court.

2. The going business of the Kimball Laundry Company was taken by the petitioner on or about November 21, 1942. The allegations set forth in the respondent's first motion to advance this cause for hearing, dated and filed and served on petitioner on May 2, 1944, and the allegations set forth in the second motion of the respondent to advince the cause for trial, served and filed on October 25, 1944, are hereby referred to and made a part of this motion. Shortly after the first of December, 1945, in open court the respondent was advised that a jury, then panelled, could be called by the Court to hear this cause any time after the first of January, 1946. Accordingly, this application is made to so callosaid jury any time at the Court's convenience and, if possible, not later than February 11, 1946.

3. The respondent protests against the continuance of this cause for hearing at the regular April, 1946, term of this Court, for the reason that it has now been determined, as the respondent is informed and believes, that the Army Quartermaster Corps intends to vacate said property on or before February 15, 1946. The Kimball Laundry Company is without sufficient funds to re-establish itself in business. The petitioner has steadfastly refused to supply sufficient funds in the form of damages for the taking, with the result that irreparable damages are now and will continue accruing, not only to the detriment of the respondent but to the great detriment of the petitioner. Respondent has offered to contract with the Army Quartermaster Corps to perform the laundry and dry cleaning services, providing that the petitioner recognized and paid the damages sufficient to permit the respondent to re-establish itself in the laundry business. Said arrangement was satisfactory, so the respondent is informed and believes, so far as the Quartermaster Corps in this area is concerned, but nevertheless, the petitioner has refused and now refuses to recognize the necessity of supplying the respondent with an adequate measure of damages for just compensation for the taking.

Consequently, under the laws in such cases made and provided, this respondent again prays the Court to call said jury and do so as reasonably promptly as possible at the convenience of the Court, not later than February 11, 1946.

Dated January 17, 1946. (Signed K. L. Co. by Attys.)
Service ack. by U. S. D. Atty.

[Trial proceeded before jury on March 4 to 20, 1946. Court struck Respondent's Answer, Or. Vol. I, Folio 37, at opening of trial before jury.]

[fol. 121] RESPONDENT'S PETITION ON APPEAL TO UNITED STATES DISTRICT COURT

Filed Mar. 18, 1946.

Comes now the Kimball Laundry Company, a corporation, respondent and now plaintiff, and alleges:

I

That it appealed from the award of the appraisers and

also filed a petition for review from said award, as more particularly set forth in the pleadings on file in this cause.

II

That the Court on March 4, 1946, struck from the files the respondent's answer filed in this cause in this Court. That respondent, now plaintiff, was privileged to adopt said answer as originally filed as its pleading in this cause for hearing on appeal. That the Court's order in reference to the striking of said pleading was made on the same morning that this case came on for hearing, and the Court gave permission to the respondent to file a petition for the hearing on the appeal from the appraisers' award, any time during the trial and before the final submission of this cause to the jury, and accordingly this petition is filed. Exception is taken to the Court's ruling on said March 4, 1946, striking the contents of the answer on file.

III

That the United States of America filed in this Court on November 21, 1942, a petition in condemnation for respondent's, now plaintiff's, land, therein described as land, and added thereto the following:

"together with the improvements situated thereon, and also all the personal property located thereon and therein, and used in connection with said laundry except only the delivery equipment."

That said property so taken was allegedly taken for a temporary use for a term of one year, with exclusive power vested in the government to extend the term at will. That said power has been so exercised annually, and the present term so extended fixes June 30, 1946, as a termination date. That the Quartermaster Corps of the United States Army has indicated its present intention to abandon said property on or about March 22, 1946, and has instructed the Kimball Laundry Company that said property would be abandoned on said date. That the property taken was the Kimball Laundry Company's laundry and dry cleaning establishment as a going con-
[fol. 122] cern, fully equipped and manned. That the government desired and took said assets on the morning

of November 22, 1942, and has been in possession thereof and operating the same at all times since said date.

IV

That the respondent's, now plaintiff's, property had been operated for twenty years on the location as a laundry and dry cleaning establishment, during which time it had built up highly valuable trade routes, both residential and commercial, by definite contractual relationships with persons and firms for laundry service. That these contracts as built were maintained by said Kimball Laundry Company until the property was taken and were capital assets of said laundry and dry cleaning establishment and inhered as an integral part thereof. That these contracts were totally destroyed directly by the taking, because the Quartermaster Corps of the United States Army substituted its own customers composed of enlisted men, officers, etc., and excluded the Kimball Laundry Company from carrying on or fulfilling its contracts for services with the numerous persons, firms, and corporations designated and appearing on its books.

V

That the fair, reasonable market value of said property as a going concern, exclusive of the delivery equipment which consisted of fifteen delivery trucks, on said November 21, 1942, was in excess of $1,000,000.

VI

That plaintiff specifically denies the right and authority of the United States of America to take said property or any part thereof for an indefinite term called "temporary use," when the so-called temporary taking resulted in the appropriation and destruction of all plaintiff's property inhering in and to said laundry business and used in connection therewith, unless just compensation for the full damages at the time of taking be paid to the extent proven, which respondent, now plaintiff, alleges to be in excess of $1,000,000.

VII

That at this time the petitioner, now defendant, through the United States Army Quartermaster Corps, has run and operated said laundry and dry cleaning establishment

for approximately thirty-nine months for its own profit, use, and benefit. That should the Court deem the proper evaluation of a temporary use would give the Kimball Laundry Company full and just compensation, then plaintiff alleges that all elements of value, including the routes, inhering in said property at the time of taking be given full valuation and consideration at the time of taking with consequent destruction by the taking.

VIII

That the respondent, now plaintiff, being informed and believes that the petitioner, now defendant, will abandon said property on or about March 22, 1946, and having no alternative for its protection, the said Kimball Laundry Company must accept the return of said property in its present condition, and is entitled to just compensation to the extent of placing it in such condition financially as if its property had not been taken.

[fol. 123] IX

That taxes against said property, both real and personal, have accumulated which remain unpaid upwards of $21,000 for adjudication herein, to be borne or accounted for against the government.

X

That the respondent, now plaintiff, reserves to itself such other rights and privileges to which it may be entitled under the Constitution and laws of the United States in such cases made and provided and under the Constitution and laws of the State of Nebraska, including protection under the due process clauses of both Constitutions as well as the prohibition against the impairment of contract clauses in both Constitutions for the taking without full and complete just compensation.

XI

That as part of the taking the government took on November 22, 1942, soap, chemicals, and supplies used in the operation of said laundry but failed to pay therefor until July 8, 1943; that the amount paid was $34,875.50, and 6% interest should be awarded on said amount from November 22, 1942, to July 8, 1943, the date of payment.

Wherefore, respondent, now plaintiff, prays judgment for just compensation, with interest thereon at 6% from

November 22, 1942, upon all amounts awarded until paid to the respondent, as by law provided, to the end that respondent, now plaintiff, may receive by judgment in this Court the equivalent of all elements that enter into the matter of fair and just compensation for said property, evaluated as of the time of taking on November 22, 1942, including trade routes established and expenses incidental to their reestablishment, and all other damages to which the respondent may be entitled under the statutes and the Constitutions of the United States and Nebraska.

Dated March 18, 1946.

Signed by K. L. Co. and its Attys. and ack. before notary.

[fol. 125] MOTION TO STRIKE RESPONDENT'S PETITION ON APPEAL TO UNITED STATES DISTRICT COURT

Filed Mar. 18, 1946.

Comes now the United States of America, petitioner herein, and moves the Court to strike from the files and records of the Court, Respondent's Petition on Appeal to United States District Court filed herein this 18th day of March, 1946, for the reasons that:

(1) Said petition is incompetent, irrelevant and immaterial.

(2) There is no provision in the law under which such filing is permissible in cases such as the case at bar.

(3) Under the law, this cause on appeal must be tried de novo.

(4) The Court is without jurisdiction to entertain such petition on appeal. (Signed U. S. D. Atty.)

[This motion was sustained and Petition on Appeal stricken March 19, 1946, Or. Vol. II, Folio 1009.]

[For Court's instructions and exceptions and instructions requested by both sides, see infra 150 to 180, Fol. V. II, 1010 to 1045.]

[fol. 126] VERDICT OF JURY

Filed Mar. 20, 1946.

GENERAL VERDICT

1. We, the jury, duly empanelled and sworn to try and determine the issues in this cause, do find and determine

that the just compensation for the taking by petitioner of the right to use and occupy the property known as the Kimball Laundry Company, consisting of the real estate known as the East 22 feet of Lot 7, all of Lot 8, Block 171, Original City of Omaha and a one-foot strip adjoining said real estate on the North, all in the City of Omaha, Douglas County, Nebraska, together with the improvements thereon and all personal property thereon and therein and used in connection with said laundry, excepting only delivery equipment, and subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, for the term commencing November 22, 1942, and ending June 30, 1946, and including just compensation for any failure of petitioner to return the said property to respondents in the condition in which it was on said November 22, 1942, to be the sum of $297,776.03.

SPECIAL FINDINGS

2. We, the jury, do find and determine that the just compensation payable by petitioner for the right to use and occupy the said property for the term commencing November 22, 1942, to June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter during the present emergency as determined by the President of the United States, to be the sum of $70,000.00 per annum, payable annually, which said sum [fol. 127] we have computed for the term from November 22, 1942 to June 30, 1946, or 3.6 years, making the total rental for said entire period to be the sum of $252,000.00, and which said sum we have included in the total of just compensation in the sum hereinbefore set out in paragraph 1 above.

3. We, the jury, find and determine that the just compensation to date, payable by petitioner, for any failure of petitioner to return the said property to respondents in the condition in which it was on November 22, 1942, to be the sum of $45,776.03, in addition to the total rental, and which said sum we have included in the sum hereinbefore set out in paragraph 1 above.

Dated: This 20th day of March, 1946.

FRED J. NOVAK, *Foreman*

[fol. 128] NOTICE OF SURRENDER OF POSSESSION

Filed Mar. 22, 1946.

Notice is hereby given that the Secretary of War has now determined that the use and occupancy of the property known as the Kimball Laundry Company, consisting of the real estate known as the East 22 feet of Lot 7, all of Lot 8, Block 171, Original City of Omaha, and a one-foot strip adjoining said real estate on the North, all in the City of Omaha, Douglas County, Nebraska, together with the improvements thereon and all personal property thereon and therein and used in connection with said laundry, excepting only delivery equipment, and subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, is no longer necessary to or required by Petitioner, and that said property has therefore been found and declared to be surplus as of March 23, 1946.

Notice is further given that Petitioner, United States of America, will surrender said premises to Respondent, Kimball Laundry Company, on Saturday, March 23, 1946, at 8:00 A. M.

Dated at Omaha, Nebraska, this 22nd day of March, 1946. (Signed by U. S. D. Atty.)

Service ack. by Atty. for K. L. Co. Mar. 22, 1946.

[fol. 129] MOTION IN ARREST OF JUDGMENT

Filed Mar. 27, 1946.

Comes now the Kimball Laundry Company, respondent herein, and objects to the entry of the proposed judgment on the verdict as drawn and submitted by the attorneys for the petitioner, for the following reasons:

I

In entering judgment on the verdict the Court is required by law to add 6% on the general verdict of $297,776.03 as additional damages for the taking which admittedly began on November 22, 1942, and which by the election of the petitioner terminates ultimately on June 30, 1946, thus establishing for the purpose of this

case a continuous period between said dates as temporary use of the respondent's property. The damages for this period are thus $362,095.65. From this amount should be deducted the following sums of money paid into the Registry of Court on the following dates: $30,140 on June 21, 1943; $50,000 on April 6, 1944; $50,000 on August 10, 1944; and $65,000 on August 8, 1945. To each of said sums 6% should be added from the date each was paid into the Registry of the Court, figured to June 30, 1946. Said credits so figured aggregate $213,765.41.

The resulting judgment on the verdict should therefore be $148,330.24, with continuing interest at 6% from June 30, 1946, in the event that the amount is not paid into the Registry of Court on or before said date.

II

As a further objection to the proposed judgment on the verdict, the Court's attention is called to the fact that under the proposed judgment of the petitioner there has been eliminated from consideration entirely the sum of $45,776.03 which was one of the special findings "for any failure of petitioner to return the said property to respondents in the condition in which it was on November 22, 1942." Consequently, said amount, even under the petitioner's proposal, should draw interest at 6% from November 22, 1942. Said interest on said amount, figured to June 30, 1946, is $9,887.62. Respondent asserts, however, that the cutting of the judgment into parts is contrary to law, and the judgment on the verdict must be for the general verdict with 6% interest thereon from November 22, 1942, to June 30, 1946, less the amounts paid into the Registry of the Court, with interest at 6% thereon to June 30, 1946, from the date of payment, in order to reach the judgment required by law.

III

Motion is further made that said judgment include interest on $34,875.50 from November 22, 1942, to July 8, 1943, which aggregates $1,309.66. This situation comes about by the fact that under the petition of taking, all

[fol. 130] property of the Kimball Laundry Company was taken except the delivery trucks. In said plant and necessary for the use of said government were vast stores of soap, chemicals, wrapping paper, and similar perishable items. These were taken and used by the government beginning November 22, 1942. They were paid for directly by the government on July 8, 1943, by warrant drawn by the petitioner and payable to the respondent. Said property became the property of the petitioner only by virtue of said condemnation proceedings and were used as a part of the operations of said laundry by the government, without which the laundry could not have promptly and conveniently operated. As to the amounts and the dates of payment there is no dispute.

IV

It is admitted that the property was taken on November 22, 1942, and exclusive possession of the petitioner began on that day. While the petition of taking stated that the first estimate of the temporary use was for one year, the reservation was made that the temporary use might be extended from time to time, and was until June 30, 1946. Each application for extension of time was not a separate and independent taking. It was merely an extension of the original taking. In accordance with the recent opinion of the Supreme Court of the United States in U. S. v. Petty Motor Co. and as more fully developed in the accompanying brief, it will be seen that the term must now be considered in this subsequent determination as a taking beginning on November 22, 1942, and ending on June 30, 1946, because there was lodged within the United States the sole and exclusive right to take the continuing temporary use by petitioner's own will, and without consent or interference by the respondent. In such cases, therefore, the taking dates from November 22, 1942, and not from any separate periods within the term for the purpose of affixation of additional damages at 6% from the original and only taking in the case.

V

Under the Rules, findings of fact are not required and are inappropriate in a jury case in condemnation proceedings. Therefore the extensive findings of fact referring to "rent" and other recitals proposed by petitioner's attorneys are contrary to court rules. Respondent moves the Court to strike from said proposed judgment on the verdict in all places where it appears the word "rental," because the same implies an agreement between petitioner and respondent, when the statute in such cases made and provided specifically designates the award to be damages for the taking (Title 40 USCA Sec. 258a, p. 139; Title 50 USCA Sec. 171, p. 121, and as amended, Sec. 171a, 1946 Supp., p. 151; Title 50 USCA Sec. 632.)

VI

Should the Court deny the respondent the additional award of 6% figured as set forth in paragraph I hereof, and should the Court leave within the proposed judgment as drawn by the petitioner the recitals and findings, and enter judgment as requested by petitioner, the respondent's constitutional rights and guaranties will have been violated in reference to "due process" and "just compensation" under the Fifth Amendment to the federal Constitution and under Sections 3 and 21 of the state Constitution, and under the state statutes and decisions relating to condemnation proceedings as well as federal statutes and decisions relating thereto.

[fol. 131] VII

Conclusion: The respondent requests the privilege of this Court to draw and submit for the Court's approval the judgment on the verdict as the respondent believes proper, as based upon said verdict. In filing this motion, respondent waives none of the objections made by it or exceptions granted in any of the proceedings shown in the records and files herein or in the proceedings and trial. The motion is made to call the Court's attention to avoidance of error in signing the judgment on the verdict proposed by the petitioner in reference to the matter

of 6% additional compensation and the method of figuring the same.

Dated March 27, 1946. (Signed by Attys. for K.-L. Co.)
Service ack. by U. S. D. Atty.

[fol. 132] JUDGMENT ON VERDICT

Filed Apr. 9, 1946.

This cause came on for hearing upon petitioner's Petition in Condemnation filed herein on November 21, 1942, and Motions to Extend Term Condemned filed herein respectively on May 11, 1944, May 31, 1944, and May 28, 1945, and the Orders of this Court duly entered upon said Petition and said Motions, and upon the Declarations of Taking heretofore filed herein, respectively, on the 19th day of June, 1943, on the 6th day of April, 1944, 10th day of August, 1944, and on the 8th day of August, 1945, and the Orders of this Court respectively entered thereon and upon Appeal from the Report of the Board of Appraisers herein, and

This Cause then came on for trial before a jury beginning on the 4th day of March, 1946, and all parties were present in Court and represented by their respective counsel. Petitioner was represented by Special Attorneys, Emmet L. Murphy and Charles D. Hitch, and Respondents were represented by their attorneys, William J. Hotz and Gordon Diesing. A jury was duly empaneled, evidence was adduced by both parties, and arguments duly made to the jury by counsel for both parties, whereupon the jury was instructed by the Court in conformity to law and retired for deliberation. After due deliberation, the jury on the 20th day of March, 1946, returned its verdict in words and figures as follows:

"*General Verdict*—1. We, the jury, duly empanelled and sworn to try and determine the issues in this cause, do find and determine that the just compensation for the taking by petitioner of the right to use and occupy the property known as the Kimball Laundry

Company, consisting of the real estate known as the East 22 feet of Lot 7, all of Lot 8, Block 171, Original City of Omaha and a one foot strip adjoining said real estate on the North, all in the City of Omaha, Douglas County, Nebraska, together with the improvements thereon and all personal property thereon and therein and used in con-
[fol. 133] nection with said laundry, excepting only delivery equipment, and subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, for the term commencing November 22, 1942, and ending June 30, 1946, and including just compensation for any failure of petitioner to return the said property to respondents in the condition in which it was on said November 22, 1942, to be the sum of $297,776.03.

"*Special Findings*—2. We, the jury, do find and determine that the just compensation payable by petitioner for the right to use and occupy the said property for the term commencing November 22, 1942, to June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter during the present emergency as determined by the President of the United States, to be the sum of $ 70,000.00 per annum, payable annually, which said sum we have computed for the term from November 22, 1942, to June 30, 1946, or 3.6 years, making the total rental for said entire period to be the sum of $252,000.00, and which said sum we have included in the total of just compensation in the sum hereinbefore set out in paragraph 1 above.

"3. We, the jury, find and determine that the just compensation to date, payable by petitioner, for any failure of petitioner to

return the said property to respondents in the condition in which it was on November 22, 1942, to be the sum of $ 45,776.03, in addition to the total rental, and which said sum we have included in the sum hereinbefore set out in paragraph 1 above.

"Dated: This 20th day of March, 1946.

/s/ FRED J. NOVAK,
Foreman"

This cause thereupon on the 20th day of March, 1946, came on for entry of a judgment on the verdict. In conformity to the verdict and the law, the Court makes the following Findings and Orders:

The Court finds that there is due Respondents from Peitioner the total principal sum of $297,776.03 as just compensation for the right to use and occupy the property known as the Kimball Laundry Company, located at 1504 Jones Street, Omaha, Nebraska, consisting of the real estate known as the East 22 feet of Lot 7, and all of Lot 8, Block 171, Original City of Omaha and a strip one foot wide adjoining the aforesaid real estate on the North, all in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon [fol. 134] and also all the personal property located thereon and therein and used in connection with said laundry, excepting only the delivery equipment, for the term beginning November 22, 1942, and ending June 30, 1946, and including all damage and restoration costs to this 20th day of March, 1946.

The Court further finds that the fair annual rental on use value of said property, exclusive of damages and restoration costs, as found and determined by said jury in its said verdict, is the sum of $70,000.00 per year.

The Court further finds that the amount of such rental or use value for the original term of November 22, 1942, to June 30, 1943, or six-tenths (.6) of a year is the sum of $42,000.00. There was paid into the registry of this Court by Petitioner on June 21, 1943, to apply on the amount due for said term, the sum of $30,140.00 and

which said sum was thereafter withdrawn by Respondents. Respondents are entitled to interest at six per cent per annum on said sum of $42,000.00 from November 22, 1942, to June 21, 1943, amounting to the sum of of $1,462.99; and respondents are further entitled to interest at the rate of six per cent per annum on the unpaid excess of $11,860.00 from June 21, 1943, until paid.

The Court further finds that there was paid into the Registry of this Court by Petitioner on April 6, 1944, to apply on the amount due for the term of July 1, 1943, to June 30, 1944, the sum of $50,000.00 and which said sum was thereafter withdrawn by Respondents. Respondents are entitled to interest at six per cent per annum on the sum of $70,000.00 from July 1, 1943, to April 6, 1944, amounting to the sum of $3,220.00; and respondents are further entitled to interest at the rate of six per cent per annum on the unpaid excess of $20,000.00 covering said term from April 6, 1944, until paid.

The Court further finds that there was paid into the Registry of this Court by Petitioner on August 10, 1944, to apply on the amount due for the term of July 1, 1944, to June 30, 1945, the sum of $50,000.00 and which said sum was thereafter withdrawn by Respondents. Respondents are entitled to interest at six per cent per annum on the sum of $70,000.00 from July 1, 1944, to August 10, 1944, amounting to the sum of $455.00; and Respondents [fol. 135] are further entitled to interest at the rate of six per cent per annum on the unpaid excess of $20,000.00 covering said term from August 10, 1944, until paid.

The Court further finds that there was paid into the Registry of this Court by Petitioner on August 8, 1945, to apply on the amount due for the term of July 1, 1945, to June 30, 1946, the sum of $65,000.00 and which said sum was thereafter withdrawn by Respondents. Respondents are entitled to interest at six per cent per annum on the sum of $70,000.00 from July 1, 1945, to August 8, 1945, amounting to the sum of $431.69; and Respondents are further entitled to interest at the rate of six per cent per annum on the unpaid excess of $5,000.00 from August 8, 1945, until paid.

The Court further finds that said Respondent, Kimball Laundry Company is entitled to interest at six per cent per annum on the additional sum of $45,776.03 from March 20, 1946, until paid.

The Court further finds, therefore, that after adding the interest hereinabove computed, amounting to $5,569.68, to the principal sum of said just compensation in the sum of $297,776.03, and deducting from such total the amount of the payments heretofore made as hereinabove set out in the total sum of $195,140.00, that there is due Respondents from Petitioner the total net sum of $108,205.71, together with interest at six per cent per annum on the unpaid respective excess amounts as hereinabove set out in the five immediately preceding paragraphs, to wit:

Six per cent per annum on $11,860.00 from June 21, 1943, until paid.

Six per cent per annum on $20,000.00 from April 6, 1944, until paid.

Six per cent per annum on $20,000.00 from August 10, 1944, until paid.

Six per cent per annum on $5,000.00 from August 8, 1945, until paid.

Six per cent per annum on $45,776.03 from March 20, 1946, until paid.

The Court further finds that at this time Petitioner is still in possession of said premises and that there may be a further motion for extension of the term and for the use of said premises beyond June 30, 1946; and that there may be some additional damage caused to said premises by Petitioner, its agents and employees, from and after the date hereof and prior to the date on which said premises and property may be surrendered back to the pos- [fol. 136] session of Respondents, and that any claims of Respondents, if any, in respect thereto are not susceptible of proof or determination at this time and that this Court should retain jurisdiction of this Cause as to said matters mentioned in this paragraph.

It is, therefore, ordered, considered and adjudged by the Court that Respondents, Kimball Laundry Company, have and recover from Petitioner herein as just compen-

sation for the use and occupancy of said above described premises for the term beginning November 22, 1942, and ending June 30, 1946, and including all damage and restoration costs to this 20th day of March, 1946, the additional sum of $108,205.71, being the total principal sum of said just compensation in the sum of $297,776.03, plus interest hereinabove computed in the sum of $5,569.68, less the sum of $195,140.00 heretofore paid by Petitioner and received by Respondents through the Registry of this Court; and in addition thereto, interest at the rate of six per cent per annum on the sum of $11,860.00 from June 21, 1943, until paid, and interest at the rate of six per cent per annum on the sum of $20,000.00 from April 6, 1944, until paid, and interest at the rate of six per cent per annum on the sum of $20,000.00 from August 10, 1944, until paid, and interest at the rate of six per cent per annum on the sum of $5,000.00 from August 8, 1945, until paid, and interest at the rate of six per cent per annum on the sum of $45,776.03 from March 20, 1946, until paid.

It is further ordered, considered and adjudged by the Court that this Court shall and does hereby retain jurisdiction of this Cause for the purpose of determining later in this action, if necessary, any additional claim, if any, which Respondents may hereafter have against Petitioner, either by reason of Petitioner extending its term of use and occupancy of said premises beyond June 30, 1946, or by reason of any additional damage to said premises caused by Petitioner, its agents or employees, if any, after March 20, 1946, and prior to the date upon which said premises and property be surrendered by Petitioner to the possession and control of the Respondents.

The Court further finds that the County Treasurer of Douglas County, Nebraska also named as Respondent in the petition in Condemnation filed herein and was duly served with process in this proceeding but has failed to [fol. 137] make any claim or otherwise to appear before the Board of Appraisers heretofore appointed herein, and has further failed to make any claim by pleading, or otherwise in this proceeding, but has defaulted and de-

fault is hereby entered of record against said County Treasurer of Douglas County, Nebraska: and

It is further ordered, considered and adjudged that said County Treasurer of Douglas County, Nebraska, has no claim or interest in or to any of the funds hereinabove mentioned and set out.

Respondent excepts to each and every of said findings, verdict and judgment, and such exceptions are granted.

(Signed U. S. D. Judge.)

[fol. 138] MOTION FOR NEW TRIAL

Filed April 19, 1946.

Comes now the respondent, Kimball Laundry Company, a corporation, and moves the Court to grant a new trial and vacate the judgment on the verdict of the jury which was rendered on March 20, 1946, the said judgment being signed, filed, and entered on April 9, 1946. This motion is made under the provisions of Rules 59a and 60b, F. R. C. P., and is based on the following grounds:

PART I

1. The Court erred in overruling the respondent's motion in arrest of judgment served and filed herein on March 27, 1946.

2. The Court erred in signing and entering the judgment on the verdict on April 9, 1946, because the judgment failed to include the statutory additional sum of 6% on the total award of $297,776.03 from the date of the taking on November 22, 1942, until paid, as clearly provided by Title 40 USCA 139, Sec. 258a.

3. The Court erred in entering the judgment on the verdict by stating therein as recitals that there were separate declarations of taking filed by the government on June 19, 1943; April 6, 1944; August 10, 1944; and August 8, 1945, when the contrary appeared of record, in that there was only one declaration of taking which was filed on November 21, 1942, and one order for taking with no limit of time therein fixed. The recital by the Court of several different takings is prejudicial because it formed apparent proper dates for figuring of interest dating from said respective so-called dates of taking.

4. The Court erred in denying the respondent the right to be heard and granting judgment on the matter of interest on $34,875.50 of supplies condemned and taken by the government on November 22, 1942, and not paid for until July 8, 1943. This interest amounted to $1,307.11.

5. The Court erred in denying the respondent the right to be heard and in entering judgment on the matter of expenses of $3,153.97 paid by respondent and made necessary because of the taking in the proceedings before the Board of Appraisers. The motion and order of the Court filed and entered herein are by reference made a part of this motion for new trial.

6. The Court erred in submitting to the jury the General Verdict, paragraph 1, and the Special Findings, paragraphs 2 and 3, set forth in the judgment on the verdict and signed and filed herein on April 9, 1946, for the reason that the Special Findings were contrary to the law of the case and were of no value to either the Court or petitioner's counsel, but the request therefor did confuse the [fol. 139] jury in the assessment of just compensation for returning the property to the respondent in the condition in which it was on November 22, 1942, by awarding $45,776.03 for some purpose as an overall sum for all other damages, and was therefore grossly inadequate in amount. The Special Finding No. 3 was too vague, and there has been a miscarriage of justice which should be remedied by vacating the said verdict to the extent of said Special Finding.

7. The Court erred in giving the instructions that it did over the objection of the respondent, especially when the Court failed to recognize as an element of damage the destruction of the trade routes of the respondent and told the jury to ignore the same, even though there was no evidence thereon permitted by the Court. Furthermore, in the Court's definition of consequential damages, he told the jury that all such matters, such as business, good will, and loss of profits and trade routes, were consequential damages and should not be taken into consideration by the jury. Thus, the Court's instructions to the jury were inconsistent and confusing and erroneous, be-

cause after telling the jury to find an amount of money that would place the Kimball Laundry Company in the same position financially that it was on November 22, 1942, the Court withdrew from the consideration of the jury the damages that inhered and were directly a part of the destruction occasioned by the taking, i.e., the established trade routes.

8. The Court erred in rejecting the evidence and the offers of proof of the respondent's witnesses and the exhibits, as follows:

(a) Testimony of the witness, Harry A. Jacobberger, in his offer to prove the value of the Kimball Laundry Company on November 22, 1942, and at the time of trial, and to the same effect the witness, A. L. Jacobberger, and to the same effect the witness Goodwin. In all such instances the Court denied the respondent the right to show the value of the Kimball Laundry Company at the time of the taking and at the time of trial and to instruct the jury that the measure of damages was the difference in the two valuations.

(b) Testimony of the witness Judd and his Exhibits 14, 15, 16, and 17, clearly showing the accepted value of the different trade routes directly destroyed and the cost to reestablish them as an element of direct damage in the taking; and to the same effect testimony of the respondent's witnesses, A. L. Jacobberger, Fred Jacobberger, and Harry A. Jacobberger, each of whom offered to establish the validity and the facts set forth in said Judd Exhibits 13, 14, 15, 16, and 17.

(c) Testimony for respondent of the certified public accountant, C. L. Hillmer, and his Exhibits 1 to 8, inclusive, being complete audits of the Kimball Laundry Company showing its progressive growth and its value at the time of the taking on November 22, 1942, and clearly demonstrating the proper basis for damages at the time of the trial and for any and all purposes, whether for temporary or other use.

(d) Testimony of the witness Hillmer showing the amount of money that was placed into the machinery and equipment in the nature of repairs, replacements, and

additions each year up to the time of the taking, and the same in reference to repairs, upkeep, and replacements of the building and the mechanical parts, all of which exhibits are the standard methods of proving basic values. By the rejection of this testimony and exhibits, the rights of the respondent were prejudiced before the jury and a fair trial denied respondent, and said rejection constitutes reversible error.

[fol. 140] (e) Testimony of the witness Dohlquist, giving the money that would be required to repair the machinery and equipment destroyed by the government, when offered to rebut the government's witnesses La-Turner and Newcom. The Court further erred in denying the witness Dohlquist the right to evaluate the laundry business and equipment as he found it shortly before the time of trial, and the same was rejected upon the grounds that such was immaterial to the issues in rebuttal, even though the government witnesses Weber and Sholes had given testimony to that effect.

(f) Testimony of the witness, Peter Kiewit, in rebuttal when offered to prove that the government witnesses' evidence in reference to the cost of restoration of the building and mechanical parts was erroneous and false, and the Court erred in rejecting Exhibit 53 prepared by the said witness Kiewit which itemized the expense as viewed by the expert Kiewit.

(g) Testimony of the witness Steinheimer, in rebuttal to prove that the testimony of the government witnesses in reference to the painting of the building's interior was erroneous and false, and in rejecting a letter of the said witness Steinheimer, Exhibit 52, written to the government's witness Rorick. It was offered to impeach the witness Rorick, as well as to rebut the testimony in the record by the government that a two-coat job of painting could be done for approximately $8,000 when actually it would cost $17,000 according to the witness Steinheimer. Also, the Court erred when it stopped the witness Steinheimer from relating that the government witness Rorick had gone to him and asked him not to disclose the figure of $17,000 as the corrected estimate.

(h) The letter showing the cost of the installation and repairs of two boilers, written by Mr. Hannigan, Exhibit No. 55, which was a direct impeachment and in rebuttal to the testimony of the government witness Crowder.

(i) Respondent's Exhibit No. 47 which was a summary prepared by it, and should have been received to explain the testimony of the government's witnesses Weber, Sholes, and Crowder.

(j) Any and all testimony offered by the respondent in direct examination, redirect, cross, recross, or rebuttal, whether the testimony was oral or written, because in each instance the respondent's evidence adhered to the fixed principle of law that it was entitled to be paid as a matter of just compensation the value of any property of the Kimball Laundry Company taken, damaged, or destroyed in the taking by the government on November 22, 1942. Such evidence was admissible, and it constituted in each instance of rejection reversible error, and at this time new trial should be granted.

(k) Testimony of the respondent, whether oral or documentary, as more particularly shown in the stenographic report of the proceedings and to which reference is specifically made in each instance and upon which errors and the accumulation thereof this motion for new trial is predicated.

9. The Court erred in admitting the following testimony and exhibits:

(a) Testimony of the government witness Weber, and as summarized by that witness in the government's Exhibit No. 22, because the witness Weber had shown himself definitely incompetent to give the figures and valua- [fol. 141] tions set forth. His method of computation by figuring a fixed yearly depreciation without having actually seen the property in 1942 and without knowing the value of laundry machinery and equipment in the City of Omaha and as installed in the Kimball Laundry Company plant, was erroneous. The witness, a professional appraiser whose deductions were from hearsay, was wholly incompetent. Especially did the witness's evidence

become prejudicial when it appears from the verdict of the jury that it followed exactly that which the witness Weber set forth in his Exhibit No. 22 as to so-called "rent."

(b) The government's Exhibit No. 24 made by the government witness Sholes, and his testimony as to values, because he was shown to be incompetent to give values of laundry and dry cleaning properties. Further, the method of figuring values as set forth in the said Exhibit No. 24 and submitted to the jury was highly prejudicial because the conclusions given were made up by figuring percentages of depreciation rather than actual values at the time in question. The witness Sholes could not legally have qualified on values; and because of his incompetency and his total lack of experience in the laundry business, his own plan of circumvention of the laws of evidence constituted reversible error, and new trial should be granted.

(c) The government's Exhibits No. 10, 11, and 21, verified by the Witness, C. R. Crowder, who was a government engineer who knew nothing of the value of the laundry and dry cleaning plant at any time, or the value of the machinery or equipment therein at any time, as his experience was along other lines. He was not present in Omaha at the time of the taking; he had no experience whatever in the laundry and dry cleaning business; as shown by the said exhibits signed by the said C. R. Crowder, the witness merely went about and asked different persons what the cost would be to replace machinery and equipment and to repair the same. Especially do the witness's testimony and the government's Exhibits No. 10, 11, and 21 become highly prejudicial as given to the jury, because the Court announced to the jury during the course of the trial and over the objection of the respondent that the sheets which went to make up all the said government Exhibits 10, 11, and 21 were "actually government records," or words to that effect. Such language was highly prejudicial and placed the stamp of approval of the Court itself upon the said exhibits, not one of which sheets

making up the three voluminous exhibits would be admissible in any court if offered separately for any purpose.

(d) The government's Exhibit No. 1, which was counsel's summary of the estimates made by the respondent's witness, A. L. Jacobberger, because included in the exhibit as received by the Court and submitted to the jury were misstatements diametrically opposite to the testimony of the witness Jacobberger. For example: the witness Jacobberger had merely explained on cross-examination what would become of the money in the event that the Kimball Laundry Company were paid $570,000. Included therein under the admonition of the Court previously there was no destruction of trade routes.

(e) The government's Exhibits No. 13, 14, and 15, as estimates from different witnesses for the cost of work to be done on the building and equipment of the Kimball Laundry Company, when in no instance did it pertain to value and in no instance was it specific enough to be considered a specification for replacement value and was therefore highly prejudicial to respondent's case. To the same effect was the receipt in evidence of the government's Exhibits No. 12, 12a, and 12b which should have been rejected, because summaries of incompetent testimony.

[fol. 142] (f) Government's Exhibit No. 8, which was a summary of maintenance men employed by the Quartermaster Corps at the laundry; and no one present, even the men, to tell what they did to earn the money shown paid to them on the exhibit. The respondent's Exhibit No. 6 was erroneously rejected by the Court, which showed the maintenance and repairs and replacements made by the Kimball Laundry Company in dollars and cents immediately preceding the taking. By rejecting the respondent's Exhibit No. 6 and admitting the government's Exhibit No. 8, the Court permitted the jury to obtain the impression, with the Court's approval, that the government had properly maintained the machinery and equipment, without any evidence of comparison with the manner in which the Kimball Laundry Company had

expended time, money, and effort and employed men for upkeep and replacements in the same plant and with the same machinery and equipment. The standard of maintenance was thus exclusively fixed by the government to the prejudice of respondent's case on that point. New trial in fairness should be granted, because of this additional and accumulated error.

(g) The government's Exhibit No. 17, which was received as U. S. Government Engineers Exhibit D, and the same in reference to Exhibit No. 18, as Government Engineers Exhibit E, when said figures were compiled by men who had no knowledge whatever of the subject matter and were made by the witness Crowder or under his direction, and upon which apparently the jury relied because of the constant reiteration by the Court throughout the trial of the competence of the witness Crowder and that his documents were "actually government records."

10. The Court erred in refusing to give each of the written instructions to the jury submitted to the Court by the respondent at the close of the testimony, because in each instance of the rejection of the written instructions offered by the respondent, applicable law was therein pronounced. With each submitted instruction was cited for the use of the Court one substantiating legal opinion of the higher courts of this land on the exact instruction. The refusal to give the respondent's instructions was made in the jury's presence, with the innuendo of impropriety for so requesting.

11. The Court erred in giving the instructions offered by the petitioner which it did, as shown by the record, because in each instance of the instructions so given the Court gave to the jury instructions that were contrary to the law applicable to condemnation cases, as will be seen by reference to the instructions on file that were given as offered.

12. The Court erred in each instance, as shown by the record, where objection was made by the respondent to the testimony of the government's witnesses and exhibits, which objections were overruled by the Court and the tes-

timony or exhibits received in evidence, all as more particularly shown by the stenographic report of the proceedings in each instance and to which reference is hereby made, and upon which errors and the accumulation thereof this motion for new trial is predicated.

13. The verdict is contrary to law and is not supported by sufficient evidence; and even though the verdict is supported by some substantial evidence, it should be set aside to avoid a miscarriage of justice because of the accumulation of errors and confusion in the issues formulated by the Court as each instance arose, and which in the main were inconsistent and erroneous.

14. The verdict is against the clear weight of the evidence and is based upon false evidence in the particulars above shown, and especially shown by the government [fol. 143] witnesses Crowder, Alexander, Rorick, Weber, and Sholes. The jury were denied an opportunity to view and pass upon proper evidence offered by respondent, as hereinabove more particularly set forth, and especially of the witnesses Harry A. Jacobberger, A. L. Jacobberger, Fred Jacobberger, C. L. Hillmer, Judd, Dohlquist, Kinder, Goodwin, Kiewit, and Steinheimer, all of whose testimony was in effect substantially rejected. Because thereof, a new trial should be granted to respondent to prevent miscarriage of justice and to prevent delay and expense on appeal to present obvious reversible errors.

[fol 144] PART II

The verdict rendered in this case on March 20, 1946, upon which judgment thereon was signed, filed, and entered on April 9, 1946, should be vacated and set aside and new trial granted to respondent to remedy a miscarriage of justice, in that the respondent was taken by surprise, through no fault of its own but solely due to the attitude of the trial judge toward respondent, in the following particulars, to wit:

1. When the petition for taking was filed on November 21, 1942, the respondent filed a very full answer setting forth its legal defenses and the true facts. Reference is made to this answer (filed August 23, 1943). After

approximately one year a Board of Appraisers was called. Oral application was made to the Court to properly instruct the appraisers on the measure of damages for the taking. This the Court refused to do. Thereafter in due time the respondent filed an appeal from the Board of Appraisers (December 7, 1943) and a petition in error (December 18, 1943) under the Nebraska statute. Each of these are by reference made a part of this motion, because they set forth fully the legal position taken by the respondent as viewed by it.

2. Thereafter, and on May 2, 1944; October 25, 1944; and January 17, 1946, written applications were made to set this case for trial before a jury. In each instance the Court stated that he was not clear on the issues of law that were to be presented and desired to await the outcome of certain pending cases in other courts, the principal one of which was the General Motors Company case (323 U. S. 373) finally decided by the Supreme Court of the United States on January 8, 1945. Immediately thereafter counsel for respondent requested that this cause be set for trial, as above shown.

3. During this entire period of time, the court was fully apprised, as shown by the record, that the damages were accumulating and the rights of the respondent were being seriously jeopardized by ever-increasing damages. As the record shows, no money of any nature or kind whatsoever was paid into court until seven months after the taking when $30,140 was deposited on June 21, 1943; then again on April 6, 1944, $50,000; August 10, 1944, $50,000; and August 8, 1945, $65,000. The Court well knew from the record before it that the respondent was totally deprived of its trade routes and customers as a direct result of the taking, and well knew the same could not be reestablished with the entire plant in operation by and for the Government Quartermaster Corps. No definite dependable termination date was fixed for the temporary use. This the Court well knew from the pleadings of the respondent before it and the admission of the petitioner.

4. The Court well knew what elements constituted an absolute taking. The Court well knew the position of respondent was that the government performed an absolute taking. The Court well knew respondent's position was that just compensation was the difference between fair market value of the property at the time of the taking and the fair market value of the property at the time of trial or abandonment. The Court well knew at the time of trial that the property was to be abandoned by the Quartermaster Corps on March 22, 1946, because a pleading was filed during the course of the trial by respondent calling the Court's attention to the fact that such notification had been given. Nevertheless, the Court submitted to the jury a request for special findings, to the effect that the government might elect to keep said property, and therefore the future so-called rental should be fixed by a jury at this time, totally disregarding the fact that the damage was then over and readily measurable by the value of what remained. The Court well knew, with the delays and the withholding of the pay-
[fol. 145] ments of money from the respondent, that the so-called temporary use and occupancy resulted in an absolute taking. The Court well knew that such was the theory adopted by the respondent in this action from the pleadings and files herein. Also, at the time the trial opened on March 4, 1946, the Court well knew that the respondent's position from a legal standpoint was that the respondent was entitled to the fair, reasonable market value of the property at the time of the taking, less any credit based upon the valuation of the property at the time of the return, which the Court well knew from Exhibit 22a, and the pleadings on file, was to be at the close of the trial. The Court also well knew from the pleadings and files that the respondent's legal position was that all the evidence to be introduced as to the value of machinery, building, land, and trade routes would be admissible to show the true, fair, reasonable market value at the time of the taking, and well knew respondent's entire case was so prepared and was to be so presented.

5. In order that the matter of the respondent's legal position might be passed upon by the Court and the method and the kind of evidence that would be admissible would be predetermined, the Respondent on April 3, 1944, served and filed in this court a written application for a pretrial hearing, stating therein, "The case involves questions for the Court's decision in a condemnation proceedings."

6. On May 2, 1944, respondent filed a motion "to advance cause for final disposition," to which reference is made as if fully incorporated herein. The prayer stated:

> "Wherefore, Kimball Laundry prays this Court for an order that will forthwith bring this cause for prompt trial and for the immediate determination of the issues presented by a Petition in Error filed by the Respondent which should determine all the issues in the case, including the amount of compensation for the taking, because the valuations are practically the same as given by the witnesses for both Petitioner and Respondent."

7. At each request for disposition the Court mentioned that the issues in this case were new, and that other cases pending should first be determined, among them the General Motors Company case (323 U. S. 373), decided January 8, 1945. The Court then stated that it desired the Eighth Circuit to pass upon the case of U. S. v. Katz Drug Co. which was decided on July 31, 1945 (150 F. 2d 681). Finally a pretrial hearing was had on May 17, 1945, at which time petitioner also filed motions to strike the answer and petition in error filed long since by respondent.

8. At the pretrial hearing on May 17, 1945, the petitioner was represented by attorneys from the office of the United States District Attorney, and the respondent was represented by counsel of record. Mr. Harry A. Jacobberger, the president of the Kimball Laundry Company, and Mr. A. L. Jacobberger, the manager, were present during said pretrial hearing. A court reporter was present and certain of the matters presented to the Court were reported by the official stenographer. In ad-

dition thereto, the attorney for the respondent presented to the Court the legal propositions to be decided at the pretrial and served copy upon the counsel for petitioner. A copy of said propositions of law submitted to the Court and counsel at the said pretrial hearing is hereto attached and made a part of this motion for new trial and marked Exhibit "A."

9. At the same time the petitioner filed elaborate briefs in opposition to the position taken by the respondent, and in support of its motion to strike the petition in error and the answer of the respondent filed in this cause which set forth the legal position of the respondent, and many admitted facts relating to the condemnation of a going business which the government had taken.

[fol. 146] 10. In September of 1945 counsel appeared at the call and asked that said case be set for trial. The Court stated that it would be for trial in early December. In December the cause was advanced, until finally set for hearing for March 4, 1946, at 10:00 a. m.

11. From the statements made by the Court at the time of the pretrial hearing in May of 1945, the respondent and its counsel gained the impression that the Court would evaluate the property for the measure of damage in the manner and on the theory as shown in Exhibit "A" hereto attached. The Court made no formal order, but stated that the Court would not permit the owners of the Kimball Laundry Company to be denied full and just compensation, including that which the government could not return in any other manner excepting in dollars and cents for all values destroyed in the taking. The respondent at no time urged damages for loss of good will or future damages or destruction of business—only the fair market value of the laundry with its trade routes, residential and commercial, all of which were destroyed in the taking and could not be returned. This the Court fully understood from the briefs submitted and the pleadings on file. It was the issue before the Court for pretrial determination. The distinction between consequential damages and direct or proximate damages to the trade routes, having a fixed value in the laundry trade,

was argued and submitted to the Court at the time of said pretrial hearing and as shown in Exhibit "A" attached.

12. When said case was reached for trial on March 4, 1946, the Court, in the presence of the jury and in a forceful and emphatic voice, stated for the first time that the answer of the respondent would be stricken and that its petition in error would be stricken. The Court had previously made no ruling at the pretrial hearing; and for the first time, when the jury was in the box, the Court struck the pleadings, thus showing the Court's ruling on respondent's theory of the case.

13. At the time the petition in error and answer of respondent were stricken after the trial started, the Court stated that counsel for the respondent would have an opportunity to file an answer in the nature of a petition, as the respondent was, in effect, now the plaintiff. Accordingly, the respondent prepared what it designated, and filed during the progress of the trial before the jury, a "Petition on Appeal to the United States District Court," which was filed on March 18, 1946, with the Clerk of the court. Forthwith, the Court, in open court and before the jury, struck said petition from the files and stated in a loud voice words to the effect that the case was being tried de novo and that counsel should understand, all of which were prejudicial to the rights of the respondent before the jury. Furthermore, the Court was in error because the petition as filed was a petition on appeal from the awards of the appraisers (filed November 19, 1943), as provided by law. The proceedings are de novo, but nevertheless are on appeal from the award of the Board of Appraisers. The Court's action was detrimental and unfair and prejudicial to the rights of the respondent.

14. Soon after the trial opened, the respondent's attorney requested the Court to give a few moments to the legal propositions involved, because the Court had then for the first time ruled that the respondent was prohibited from introducing evidence to show the fair, reasonable market value of the Kimball Laundry Company as a going

concern, including its trade routes and customer's lists which were destroyed in the taking.

15. The Court did permit a short presentation, and to the surprise of the respondent the Court stated that the case of U. S. v. Petty Motor Co., 327 U. S. 372, 66 S. Ct. 596, which had been decided on February 25, 1946, was entirely in point and that the Court intended to follow [fol. 147] that decision for its guidance in the case then on trial. The advance opinion in said case was in the hands of the Court and had been in the hands of the Court for considerable time before the trial and in the hands of counsel McCloud for the government who brought it with him from Washington, D. C.

16. The respondent also filed a motion asking the Court to follow the Nebraska law, Constitution, and procedure, and pointed out that the rules of civil procedure exempted condemnation cases and that the rules in reference to condemnation cases prescribed that the law of the State of Nebraska on the question of procedure should be followed as nearly as possible. The Court, in a loud and emphatic voice and in the presence of the jury, struck said motion from the files. Said motion so filed is made a part hereof by reference, being on file herein.

17. Throughout the trial, from the very beginning and in the presence of the jury, the Court, having in its own mind the theory upon which the case should be tried and having unquestionably adopted the theory proposed by the attorneys for the government, thus placed respondent in the unprepared and surprised condition of seeking to introduce its evidence upon the theory set forth at the pretrial in its pleadings and as shown by Exhibit "A", presented to the Court on May 17, 1945, and which respondent understood would be the law applicable the oral remarks of the Court made on May 17, 1945. In each instance the Court, in a loud and emphatic manner, rejected the evidence in the presence of the jury and in many instances made such remarks to counsel as, "Will you sit down," "Your testimony will be rejected," and "You created your own theory of the case, and it is rejected."

18. Throughout the entire trial the Court showed a stern and emphatic denunciation against the respondent in all its rulings, even though the greatest consideration and ethical conduct toward the Court and opposing counsel in every instance was indulged in by the respondent and its counsel engaged in the trial of the case, as shown by the stenographic record.

19. The Court, in ruling upon the objections made by the government, gave the jury the impression that the respondent was attempting to get before the jury unfair evidence, and that such was wrong, thus creating unfavorable impression with the jury of respondent, as shown by the record of evidence, all of which might have been avoided had the Court not withheld his rulings on the pretrial issues until during the trial.

20. Respondent was prepared, as shown by the witnesses and offers of proof that were made, to show that the fair, reasonable market value of the Kimball Laundry Company, including its trade routes, was approximately $950,000. this testimony being offered by competent laundrymen who understood such values. Instead, the Court permitted the witnesses for the government, to wit, Weber, Sholes, and Crowder particularly, to state that what the government took at the time of the condemnation was valued at or about $425,000. The Court permitted the dividing up of the assets into pieces and to use the same basis for so-called rental when "rental" is obviously an erroneous term to use and was highly misleading and prejudicial in the eyes of the jury, rather than total damages, no matter whether for temporary use or any other element demanding just compensation.

21. The new trial should be granted because of these surprises and the method of handling the pretrial procedure and the giving of the Court's decision after the time of trial and after the jury was empanelled and as the case progressed, all of which has resulted in a miscarriage of justice. The request for pretrial procedure provided for exact cases, as the one at bar, to determine the issues, and asked for proof and trial procedure, but

[fol. 148] was thwarted by the Court itself. The Court itself, after the trial opened, stated, "We are plowing a new furrow," or words to that effect. The result was that the petitioner went before the jury obviously well prepared with what the Court had in mind as to the method of procedure and with the respondent totally in ignorance that the Court would not permit evidence to go in as to the value of the Kimball Laundry Company with its trade routes as of November 22, 1942, and its value at the time of trial either for the government or for the Kimball Laundry Company, if the government abandoned it to the Kimball Laundry Company. This surprise constitutes unfairness. Unfairness results in injustice which this Court has the power and privilege to remedy by new trial.

22. Had the respondent been apprised by the Court that the value of use and occupancy alone would be admissible in the case, then the respondent would have been able to meet that issue in an orderly manner by competent laundrymen, and the jury would not have received the impression, which it unquestionably did, that only the evidence offered by the government's witnesses was acceptable to the Court, and the respondent was engaged in unacceptable conduct in offering evidence, much of it long and confusing to the jury when it saw long offers and many exhibits offered privately for the record. But the Court constantly reiterated his ruling of rejection, often coupled with denunciation of respondent, as shown by the stenographic record.

23. The Court withheld all rulings requested at the pretrial hearing on May 17, 1945, until March 4, 1946, and then made rulings adverse to respondent completely and entirely and in each instance, against respondent's position, made known at the trial and in the presence of the jury, after the jury was drawn and the trial started. The Court is warranted in granting a new trial to prevent further miscarriage of justice, upon the obvious presumption that respondent has been denied substantial rights granted it under the Fifth Amendment to the federal Constitution.

24. The reason that respondent proceeded with the trial was that the Court did not make any of its rulings, excepting the striking of the answer and the petition in error by sustaining the petitioner's motions which were filed, heard, argued, briefed, and submitted to the Court on May 17, 1945, at the pretrial hearing. Consequently, the respondent had no way of knowing what the rulings of the Court would be regarding the measure of damages and the rules of evidence which the Court had in mind but which the respondent did not know and could not know until evidence was offered. Promptly upon the rejection of evidence, which gave to the respondent information as to the Court's position, respondent made application to the Court to extend courtesy to counsel to present legal authorities in the midst of the trial, as hereinabove stated. So it was only from time to time and as the case progressed that the respondent was able to determine that which should have been announced at the pretrial and which the respondent was led to believe would be the law of the case, in view of the fact that the Court had not ruled upon the petitioner's motions, and as above stated, from the statements made by the Court at the time of the pretrial hearing. New trial should be granted accordingly to prevent miscarriage of justice. It it within the sound discretion of this Court to grant such new trial, and especially should it be done when the Court itself, as shown throughout this motion, participated in the errors set forth.

25. The Court well knew, from the pronouncements made by the Court and in the record in this case, that the questions presented in this condemnation proceedings were new. The General Motors Company case, supra, and the Petty Motor Company case, supra, were cases wherein the government had condemned a leasehold of the condemnee. In neither of said cases were the landlord's [fol. 149] rights involved, while in the case at bar the Court well knew that the government condemned and took that which it was required to have, i. e., a laundry and dry cleaning establishment, ready to operate. The Court well knew that when the laundry were so taken, the dam-

ages would inure to the respondent by that taking because of the destruction of the trade routes, residential and commercial. By said taking the Court well knew that those routes were destroyed, and the Court well knew that such routes would have an intrinsic value. It was not until evidence was offered by the witness Judd that the Court would reject the value of trade routes and would reject the evidence of that value and the proof of their absolute destruction in the taking. Furthermore, the Court well knew that such element of damage was not the destruction of good will, future business, or the driving out of business, but was the destruction of an element that inhered in the particular property taken by the government. Therefore, the Court not only erred in the rejection of the evidence, but created surprise and unfairness by a failure to rule upon said subjects and withholding the ruling thereon until the evidence was presented, and then to denounce the same before the jury in forceful language, and furthermore, in the instructions to the jury, to involve the destruction of the trade routes along with good will, business, and other noncompensable items.

26. New trial should be granted for the further reason that the Court well knew that when the petition for taking in this case was filed on November 21, 1942, there existed in the United States no decisions upholding the right of the government to take a so-called temporary use from the owners of a going business and enter the operation of that business by such proceedings. Further, the Court well knew that the attorney of record for the government, Robert L. McCloud, was from the Land Division of the Department of Justice, in Washington, D. C., and that the cases had been submitted to him and argued at the pretrial hearing; that the attorneys were engaged in obtaining legal pronouncements from the Courts which were contrary to the Constitution of the United States regarding just compensation and which were diametrically opposed to all elements of fairness and all previous decisions. The Court well knew that there had crept into

the decisions of the courts the term "temporary use" regarding land cases and "temporary use" regarding condemnations of leasehold interests owned by lessees; but in no instance was there a case where the government had condemned a going and operating business without being required to pay full and just compensation therefor as of the time of taking, with the ample protection provided by the decisions and the statutes for the disposition of the property when the government no longer had use for the same. The Court well knew that the said McCloud was one of those attorneys who had aided in obtaining expressions of courts in these cases, and the Court well knew that when it adopted the theory of said McCloud when he came to Omaha, Nebraska, with the decision in the Petty Motor Co. case as a basis for the government's theory, great damage would be done to the Kimball Laundry Company in the condemnation proceedings. Yet the Court denied the respondent the right of just compensation by following the suggestions and solicitations of the said counsel from the Land Division. The Court consequently erred not only in applying the law but in permitting the plan of procedure in the condemnation court to be governed under the theory adopted by the Land Division of the Department of Justice, to the surprise and disadvantage of the respondent. New trial should be granted accordingly.

Dated April 19, 1946. (Signed Attys. for K. L. Co.)
Service ack. on April 19, 1946, by U. S. D. Atty.

[Vol. 150] EXHIBIT "A"

LEGAL PROPOSITIONS FOR THE COURT'S DETERMINATION AT PRETRIAL HEARING

I

Does Sec. 171, Title 50 USCA, Chapter 11, authorize the Petitioner, without the consent of the Respondent, to acquire by condemnation the land, building, machinery, and equipment of the Respondent, and satisfy the constitutional provision providing for just compensation by offering rent rather than the fair, reasonable market value of the property taken?

Chapter 11, Acquisition of and Expenditures on Land for National-Defense Purposes. Title 50 USCA, Sec. 171, Methods of acquiring title; condemnation, purchase and donation; emergency provision.

First War Powers Act, 1941. Title IV, Time Limit and Short Title. Title 50, USCA, Sec. 621.

Second War Powers Act, 1942.

Title II, Acquisition and Disposition of Property. Title 50 USCA, Sec. 632, Real property for war purposes. Amends Sec. 171 by addition.

Title VI, Power to Requisition. Title 50 USCA, Sec. 636, amending Sec. 721. Further amendment, Sec. 636a.

Title XV, Time Limit and Short Title. Title 50 USCA, Sec. 645, Termination of portions of Act. Limitations on Act, Sec. 775.

Chapter 3, Public Buildings and Works Generally.

Title 40 USCA, Sec. 257, Condemnation of realty for sites and other uses; jurisdiction. Sec. 258, 258a, Condemnation of realty for sites and other uses; procedure.

Military Establishment, Misc. Title 50 USCA, Sec. 775, 776.

Miscellaneous Acts;

Act of October 16, 1941. Title 50 USCA, Sec. 721, Requisition of military materials for uses; compensation. Sec. 722, Return of property to original owner.

[fol. 151] Constitutional provisions:

Federal Constitution, Fifth Amendment

State Constitution, Article I, Sec. 21.

Title 50 USCA, Sec. 721, on the question of limitation of the United States District Courts on amounts in controversy, states:

"Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722) regardless of the amount in controversy in any such proceeding."

II

Is the petition or declaration of taking a so-called temporary use, binding on the Court; or may the Court award just compensation to the Respondent, measured by the fair, reasonable market value of the property on November. 21, 1942? Respondent contends that it is not only the Court's privilege, but duty, to direct a jury to award the fair market value of the property at the time of taking, as the proper measure of just compensation.

Davis v. George B. Newton Coal Co. (1925), 267 U. S. 292, 45 S. Ct. 305.

Filbin Corporation v. U. S., 266 F. 911, 137 ALR 1291 (D. C. 1920); note at page 1301 ALR.

National City Bank v. U. S. (D. C. 1921), 275 F. 855, affirmed CCA 2, 281 F. 754. Error dismissed 263 U. S. 726, 44 S. Ct. 32.

U. S. v. Land in Baltimore (USDC Md., 5/9/44), 55 F. Supp. 257.

U. S. v. Bauman (USDC Ore., 12/6/43), 56 F. Supp. 109.

U. S. v. 60,000 Square Feet (USDC Calif., 12/30/43), 53 F. Supp. 767.

U. S. v. 9.94 Acres (USDC SC, 8/16/43), 51 F. Supp. 478. No appeal.

The foregoing cases support Respondent's contention.

The Petitioner contends that *U. S. v. 16,747 Acres* (US DC Del. 6/15/43), 50 F. Supp. 389, is [not] in point. The question presented was not raised or decided.

III

In determining just compensation, shall the Court instruct the jury to base its estimate upon the value of the Kimball Laundry Company as a going concern on the date of the taking, and in that regard may the jury consider the volume of the business, the number of customers, the gross and the net income of the business, and all other [fol. 152] evidence that a willing seller and buyer would take into consideration in a business transaction in the sale and purchase of the business? The Respondent con-

tends that to be the only measure of damages for just compensation.

U. S. v. Miller (1943), 317 U. S. 369, 63 S. Ct. 276.
U. S. v. Powelson (1943), 319 U. S. 266, 63 S. Ct. 1047.
U. S. v. CB&QR. Co. (CCA 8, 1936), 82 F. (2) 131.
National Brick Co. v. U. S. (CCA 2, 1942), 131 F. (2) 30.
Hoesly v. Dept. of Roads and Irrigation (5/14/43), 143 Neb. 387, 9 NW (2) 523.
U. S. v. General Motors Co. (1945), 323 U. S. 373, 65 S. Ct. 357.

IV

May the Court instruct the jury to receive evidence as to the value of land, building, machinery, equipment, customers and trade, each separately given, and a summation thereof as just compensation; or must the Court instruct the jury to find the fair, reasonable market value of the entire business with all its inherent qualities at the time of taking as the measure of just compensation. Respondent contends that the latter method is the only legal one to adopt for arriving at just compensation.

Fain v. U. S. (Tenn. 12/8/44), 145 F. (2) 956. citing *Norton v. U. S.* (CCA 6), 91 F. (2) 884; *Devon v. Cincinnati* (CCA6), 162 F. 633; *U. S. v. Mayer* (CCA 7), 113 F. (2) 387; certiorari denied.

Title H—Acquisition and Disposition of Property, Title 50 USCA.

"Sec. 632. *Real property for war purposes*

"The Act of July 2, 1917 (40 Stat. 241) (Title 50, Sec. 171), entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

"'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary

use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) (Title 40, Secs. 257, 258), or any other applicable Fe-
[fol. 153] eral statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1(b) of the Act of July 2, 1940 (54 Stat. 712) section (1171(b) of this Appendix.' "

V

Does the Court have the exclusive power to determine and instruct the jury that just compensation shall be the fair, reasonable market value of the Kimball Laundry Company on November 2, 1942, as a going concern? Respondent contends the determination is exclusively that of the judiciary, irrespective of the words, "temporary use," in the petition of taking and irrespective of any act of Congress in derogation of the exclusive right vested in the judiciary.

Davis v. George B. Newton Coal Co. (1925), 267 U. S. 292, 45 S. Ct. 305.

(Justice McReynolds) "The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment. * * * The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard."

The subject is fully annotated in 137 A. L. R. 1290. There are no further pertinent annotations.

"*Ascertainment and determination of compensation.* Although statutes providing for requisition of property during war, requisition orders, and other regulations frequently make provision for the payment of compensation to the owner, it has been held generally that in the absence of an agreement between the owner of the property and the government, the ascertainment and

and determination of the compensation to be paid by the government is a judicial function (citing cases), and no power exists in the executive or any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard (citing cases).

"In National City Bank v. United States (1921; D. C.) 275 F. 855 (affirmed in (1922: C. C. A. 2d) 281 F. 754, which has writ of error dismissed in (1923) 263 U. S. 726, 68 L. Ed. 527, 44 S. Ct. 32), it was stated that 'the executive officers of the government have no power to fix compensation, nor can the Congress determine by statute what is just compensation.'" (137 ALR 1301)

[fol. 154] VI

Shall the Court instruct a jury to take into consideration, as an element in awarding just compensation, the immediate, direct and inherent damages to Respondent's business? Respondent asserts that when satisfactory proof is offered of such damages and there remains no question of doubt that the taking was so interwoven with the Respondent's previous use as to leave nothing to the Respondent, then neither are such damages consequential, nor are they loss of profits or good will.

U. S. v. General Motors Corp. (1945), 323 U. S. 373, 65 S. Ct. 357.

U. S. v. Klamath, et al (1938), 304 U. S. 119, 58 S. Ct. 799.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 13 S. Ct. 622.

Sponenlarger v. U. S., (CCA 8 1939), 101 F. (2) 506.

U. S. v. CB&Q R. Co. (CCA 8, 1936), 82 F. (2) 131.

U. S. v. TVA, 41 F. Supp. 595.

James Poultry Co. v. City of Nebraska City, 136 Neb. 456, 286 N. W. 337.

Olson v. U. S. (1934), 292 U. S. 246, 54 S. Ct. 704, 708.

29 C. J. S., Eminent Domain
Sec. 11, p. 921
Sec. 136, p. 968

Sec. 137, p. 974
Sec. 139, p. 976

VII

Shall the Court instruct the jury that the fair, reasonable rental value of the land and building may be so awarded and that the fair, reasonable market value of the machinery and equipment may be separately awarded as damages; and may the destruction of the trade routes and customers as the immediate result of the taking be compensated by a proper award for damages under the Court's instructions? Respondent claims that when a business such as the Kimball Laundry Company produces evidence that its customer and laundry routes, both domestic and commercial, by the customs of the trade have an exact measure of value at a given time, it is proper for the Court to instruct the jury to receive the evidence and make the award for damages accordingly. The respondent claims, however, that there should be no separation whatever and that the award for damages should include the business as a complete unit on November 21, 1942, when appropriated by the United States Government, irrespective of the petition calling for a temporary use.

[fol. 155] See the testimony of the witnesses Harry E. Judd, Jesse L. Thurmond, H. F. Goodwin, Harry A. Jacobberger, A. L. Jacobberger.

VIII

Shall the Court construe the statutes cited under paragraph I hereof and all the decisions in the United States to date to be to the effect that there exists no congressional authority for condemning, taking over, and operating any going business? Respondent claims that in the event the government does take without statutory authority, the result is a taking of such going business for which full and complete compensation must be made as determined by the Judicial Branch of the government at the time acquired. Otherwise, the protection of the Constitution of the United States could readily be thwarted.

Statutes cited under paragraph I, p. 1-2 hereof.

U. S. v. General Motors Corp. (1945), 323 U. S. 373, 65 S. Ct. 357.

U. S. v. 9.94 Acres (USDC SC), 51 F. Supp. 478.

U. S. v. 60,000 Square Feet (USDC Calif.), 53 F. Supp. 767.

U. S. v. Bauman, 56 F. Supp. 109.

U. S. v. Certain Parcels (USDC Md.), 55 F. Supp. 257.

IX

In light of the foregoing statutes and decisions, did the Court err in submitting to the Board of Appraisers merely the allegations of the petition filed? Were not the appraisers curtailed by being limited to find rental value only?

Respondent asserts that error was committed. The appraisers found that the per annum rental for the land, building, and machinery was $74,940, payable $6,245 per month. This is not compensation for condemnation. The appraisers in their report stated:

> "We, the said appraisers, hereby further report that the undersigned appraisers recognize that at the time of the return of said property to the respondent there will be a damage for the loss of patrons, but a majority of said Board find that the same cannot at this time be appraised, and that this Board has no jurisdiction to anticipate such damage."

This finding was the result of submitting an erroneous and illegal question to the appraisers. It limited completely the Respondent's rights.

[fol. 156] Respondent has filed a petition in error under the Nebraska statute to which reference is made. This was filed timely and in pursuance of the Nebraska statute.

Hoesly v. Dept. of Roads and Irr. (5/14/43), 143 Neb. 387.

U. S. v. 250 Acres of Land (Tex. 1942), 43 F. Supp. 937.

U. S. v. Indian Creek Marble Co. (Tenn. 1941), 40 F. Supp. 811.

29 C. J. S., Sec. 296, p. 1324-5.

X

Will the Court err if, in these condemnation proceedings, it denies to the Respondent the benefits of Sec. 112(f) of the Internal Revenue Code which provides that when property is condemned, the sums received as compensation for the acquisition of the property by the government, shall become a replacement fund in the hands of the condemnee and free from federal taxation, providing that promptly the fund is used to replace the condemnee in business.

Respondent claims that unless this section is given effect in the condemnation proceedings, the Respondent will be denied its property without due process of law in violation of the Federal Constitution as well as the State Constitution.

Internal Revenue Code, Sec. 112(f).

Dated May 17, 1945.

Wm. J. Hotz, Atty. for Kimball L. Co.

[fol. 157] STIPULATION

Filed May 8, 1946

Whereas, the use, occupancy and possession of the Kimball Laundry Company property, heretofore taken herein by petitioner, was surrendered by petitioner, the United States of America, to respondent, Kimball Laundry Company, on March 23, 1946; and

Whereas, petitioner desires to sell to respondent and respondent desires to purchase from petitioner, certain items of laundry machinery owned by petitioner and located in said laundry and heretofore used in connection therewith as specifically listed and described on Exhibit "A" hereto attached, at the agreed value of $13,775.16, and certain items of laundry equipment parts, so owned, located, and used, as specifically listed and described on Exhibit "B" hereto attached, at the agreed value of $4,314.39, or a total for said laundry machinery and laundry equipment parts of $18,089.55, and

Whereas, it is further agreed by and between the parties hereto that the sum of $200.00 covers in full any

and all claims of every kind and nature for damage caused to said premises by petitioner, its agents and employees from and after the 20th day of March, 1946, and prior to the date on which said premises and property were surrendered back to the possession of respondents.

Now, therefore, it is hereby stipulated and agreed by and between petitioner, United States of America, and respondent, Kimball Laundry Company, that petitioner does hereby sell, assign, transfer, and set over to said respondent said items of laundry machinery and laundry equipment parts specifically listed and described on Exhibits [fol. 158] "A" and "B" hereto attached, for the total sum of $18,089.55.

It is further stipulated and agreed by and between the parties hereto that said sum of $200.00 constitutes and covers in full any and all claims of every kind and nature for damage caused to said premises by petitioner, its agents and employees from and after the 20th day of March, 1946, and prior to the date on which said premises and property were surrendered back to the possession of respondents.

It is further stipulated and agreed by and between the parties hereto that said sum of $200.00, together with interest thereon at the rate of six per cent per annum, from and after March 23, 1946, until paid, shall be added to the total amount of the judgment heretofore entered and filed herein on the 9th day of April, 1946.

It is further stipulated and agreed by and between the parties hereto that said sum of $18,089.55 shall be credited upon the amount due respondent under said judgment in the same manner and to the same effect as if petitioner had paid to respondent, and respondent had received from petitioner, in cash, said sum of $18,089.55 on the 23rd day of March, 1946; and further that the execution of this stipulation and the receipt by respondents of the sums herein mentioned do not constitute any admission by respondent and United States of America, petitioner, that said judgment is correct in amount or in the method of ascertainment, and shall not constitute any estoppel of the right of respondent, Kimball Laundry

Company and petitioner, United States of America, or either of them, to any appeal herein.

Dated this 8th day of May, 1946, at Omaha, Nebraska.

(Signed by Attys. for both parties.)

[fol. 159] JUDGMENT ON STIPULATION

Filed May 8, 1946.

Now on this 8th day of May, 1946, this cause came on further for hearing upon the stipulation of the parties this day filed herein.

The Court finds that said stipulation should be, and the same is hereby approved.

The Court further finds that respondent, Kimball Laundry Company, has purchased from petitioner, United States of America, certain items of personal property heretofore located in said laundry and used in connection therewith, and as listed and described on Exhibits "A" and "B" attached to said stipulation, in the total sum of $18,089.55 and that said sum should be credited upon the amounts heretofore found due herein from petitioner to said respondent.

The Court further finds that said sum of $200.00 constitutes and covers, in full, any and all claims of every kind or nature which said respondent may have or claim to have against petitioner for damage caused to said premises by petitioner, its agents and employees from and after the 20th day of March, 1946, and prior to the date on which said premises and property were surrendered back to the possession of respondents.

It is, therefore, ordered and adjudged by the court that said respondent, Kimball Laundry Company, have and recover from the said petitioner, the United States of America, the additional sum of $200.00 in addition to the sums found due said respondent from said petitioner, in the judgment heretofore entered and filed herein on the 9th day of April, 1946, together with interest at the [fol. 160] rate of six per cent per annum on said sum of $200.00 from and after March 23, 1946, and until paid.

It is further ordered and adjudged that the sum of $18,089.55 be credited upon the amount found and determined to be due said respondent under said judgment entered herein on the 9th day of April, 1946, in the same manner and to the same effect as though said petitioner had paid to respondent and respondent had received from petitioner, in cash, said sum of $18,089.55 on the 23rd day of March, 1946.

It is further ordered that the exceptions of respondent to the said judgment entered herein on April 9, 1946, be and remain unaffected, and that the execution of said stipulation and the entry of this judgment on said stipulation and the acceptance of the benefits under said stipulation or under this judgment by said petitioner and respondent shall not constitute any admission by said petitioner and respondent that said judgment entered herein on April 9, 1946, is correct in amount or in the method of ascertainment and shall not constitute any estoppel of the right of said respondent, Kimball Laundry Company, or petitioner, United States of America, or either of them to any appeal herein from said original judgment entered herein on April 9, 1946. (Signed by U. S. D. Judge.)

[fol. 161] APPLICATION FOR ORDER TO WITHDRAW FUNDS FROM THE REGISTRY OF THE COURT

Filed Aug. 8, 1946.

Comes now the Kimball Laundry Company, the respondent in these proceedings, and shows to the Court that heretofore a judgment in the amount of $297,776.03 was rendered in said cause on or about April 9, 1946, in favor of the applicant, Kimball Laundry Company, a corporation, and against the United States of America. Prior to said judgment there had been paid into court substantial sums of money by the United States Government, as shown by the records and files herein, which sums were withdrawn from the Registry of Court under and by direction and order of this Court and without prejudice to the rights of this respondent in further pro-

ceedings herein. After the judgment was rendered herein and within the ten days provided by the Rules of this Court, a motion for new trial was served and filed herein by this applicant, as shown by the records and files herein.

Further as shown by the records and files herein, the United States of America elected to accept said judgment as its measure of just compensation due the respondent, Kimball Laundry Company, and accordingly on June 11, 1946, deposited in the Registry of Court the sum of $98,124.27 in satisfaction of the deficiency judgment entered herein on April 9, 1946.

Under and by virtue of Section 258a of Title 40, USC, it is provided in all condemnation proceedings that upon the application of an interested party, such as the applicant herein, the Court may order that the money deposited in the Court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceedings. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount so received by any person entitled thereto, the Court shall enter judgment against the United States for the amount of the deficiency. Said section became a law on February 26, 1931.

In this cause, in the event that the Court does not grant a new trial, or if the Court in said new trial does not instruct the jury to award damages to the respondent based upon the value of the Kimball Laundry Company as a going concern at the time of the taking on November 21, 1942, and otherwise correct the errors as more particularly set forth in the motion for new trial pending, it is the intention of the Kimball Laundry Company to appeal said cause to the United States Circuit Court of Appeals for the Eighth Circuit. In the event that the judgment herein awarded is affirmed, then the United States Government will suffer no loss in the event of the withdrawal of the deposit or a part thereof; and in the event that the cause is reversed and remanded, it would be within the power and the jurisdiction of this Court to award judgment against the Kimball Laundry

Company if finally the award was for a smaller sum than the amount paid in Court.

[fol. 162] Wherefore, the applicant moves the Court to enter an order herein authorizing the Kimball Laundry Company to withdraw from said deposit of $98,124.27 now in the Registry of the Court, at least $90,000 thereof, or such other sum as the Court may think proper, to apply upon the final and ultimate judgment herein in the event of a new trial, or in the event of an affirmance or in the event of an increased judgment, as the case may be. Further the applicant prays that said sum may be withdrawn without prejudice to the rights of the Kimball Laundry Company to prosecute its motion for new trial and any future proceedings thereunder, and without prejudice to the rights of the Kimball Laundry Company to appeal from the judgment entered herein on April 9, 1946, and without prejudice to raise any and all the points for reversal that the Kimball Laundry Company may elect.

Dated at Omaha, Nebraska, this 7th day of August, 1946. (Signed K. L. Co. by Attys.)

Service ack. by U. S. D. Atty.

[fol. 163] ORDER ALLOWING WITHDRAWAL OF FUNDS DEPOSITED IN THE REGISTRY OF THE COURT

Filed Aug. 16, 1946.

This matter coming on for hearing this 16th day of August, 1946, upon the application to withdraw funds from the Registry of the Court, filed by the Kimball Laundry Company, the respondent herein, on August 8, 1946, and on the same day served upon Emmet L. Murphy, the attorney for petitioner; and the Court taking said application under consideration and after hearing the statement of counsel for petitioner on August 8, 1946; and it appearing that from the entire record before this Court that the Kimball Laundry Company, respondent, is financially responsible and fully solvent and that there is no good purpose that could be served in this cause by the retention of the funds in court, even though paid by the petitioner as the remainder of the judgment on

the verdict entered in this cause heretofore; and it appearing by the application of the respondent that before the withdrawal of said funds the respondent desires an order of this Court adjudging that the funds may be withdrawn without prejudice to the right of the respondent to appeal; and it appearing that at this time the Court has jurisdiction of the parties and the subject matter,

It is therefore ordered and adjudged that the respondent be and is hereby permitted, if it so desires, to withdraw from the Registry of this Court the sum of $75,000.00 of the $98,124.27 heretofore deposited by the petitioner, and may do so without prejudice to its right of an appeal in this cause, the same being done in pursuance of Sec. 258a of Title 40 USC.

Dated August 16, 1946.

Signed U. S. D. Judge and copy mailed Petitioner 8/16/46

[fol. 164] NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT UNDER RULE 73b

Filed Nov. 14, 1946.

To: The United States of America, and Joseph T. Votava, United States Attorney for the District of Nebraska, appearing of record for the petitioner:

Notice is hereby given to the United States of America, petitioner in the above-captioned case, that the Kimball Laundry Company, a corporation, respondent above-named, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final orders, findings, and judgment on the verdict entered on April 9, 1946, by the United States District Court for the District of Nebraska, Omaha Division, Honorable James A. Donohoe, Judge, the said Court therein denying respondent's motion in arrest of the judgment filed on March 27, 1946, and overruling by order entered on August 16, 1946, respondent's motion for new trial filed in said cause on April 19, 1946.

Dated November 14th, 1946.

(Signed K. L. C. by Attys.)

[fol. 165] BOND ON APPEAL

Filed Nov. 14, 1946.

The undersigned, Western Surety Company, duly authorized to write judicial bonds in the United States District Court for the District of Nebraska and for appeals to the United States Circuit Court of Appeals for the Eighth Circuit, hereby enters itself as surety for costs to insure the above-named United States of America, as appellee, that the Kimball Laundry Company, a corporation, as appellant, will pay such costs as may be adjudged against it by the United States Circuit Court of Appeals for the Eighth Circuit in the above-captioned cause to the extent of the penal sum of $250.00, or, in the event that the appeal is dismissed, such costs not to exceed $250.00 as may be awarded against the appellant by the United States District Court for the District of Nebraska, Omaha Division, from which court the appeal has been taken, or, in the event that the said appellant otherwise fails to pay such costs to the said extent of $250.00 that may be finally adjudged against said Kimball Laundry Company incident to its appeal from the said final judgment and orders of the United States District Court of Nebraska, Omaha Division, then to the said limitation of $250.00 in amount the undersigned surety will do so.

Dated at Omaha, Nebraska, this 14th day of November, 1946. (Signed by Surety.)

(Corporate Seal)

[fol. 166] Notice of appeal mailed U. S. D. Atty. Nov. 14, 1946, by Clerk U. S. D. Co.)

[fol. 167] ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

Filed Dec. 21, 1946.

This matter coming on for hearing upon the application of respondent, Kimball Laundry Company, for additional time to file the record on appeal, and in pursuance of the discretion granted this Court under Rule 73(g), F.

R. C. P., the Court grants the application on this date for fifty days' additional time, or a total of ninety days from the date of the notice of appeal filed in this cause on November 14, 1946.

It is therefore ordered that the respondent in the above-entitled cause be and it is hereby granted an extension of time of an additional fifty days, or in all ninety days from the date of the notice of appeal filed herein on November 14, 1946, for the purpose of preparing and filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Eighth Circuit as appellant.

Dated at Omaha, Nebraska, this 20th day of December, 1946. (Signed by U. S. D. Judge)

[fol. 168] STIPULATION PROVIDING THAT POINTS RELIED UPON BE SET FORTH IN BRIEFS RATHER THAN IN RECORD

Filed Feb. 3, 1947.

It is stipulated between the parties hereto that the appellant, Kimball Laundry Company, respondent in the United States District Court, may forego filing its points to be relied upon for reversal with the United States District Court as part of the transcript to be prepared and certified by the Clerk of the United States District Court. Instead, these points may be by the appellant included in the appellant's printed record in the United States Circuit Court of Appeals for the Eighth Circuit, or may be printed in the appellant's brief.

This stipulation is made because Rule 75 of the Federal Rules of Civil Procedure requires the appellant to serve and file its points relied upon for reversal with the appellant's designation of record on appeal, in the event the entire typewritten record filed in the office of the Clerk of the United States District Court is not to be fully printed. However, Counsel for respective parties understand that all the typewritten record filed in the U. S. District Court is to be printed, save and except the condensation and description of certain exhibits, and the elimination of certain photographs and plats, as

more particularly referred to in the appellant's designation of record.

Consequently, this stipulation is made agreeing to the printing of the points relied upon by appellant for reversal as hereinabove set forth.

Dated February 3, 1947.

(Signed by Attys. for both sides)

[fol. 169] DESIGNATION OF RECORD ON APPEAL BY KIMBALL LAUNDRY COMPANY

Filed Feb. 3, 1947, and signed by Attys. for both sides.

1. The pleadings, motions, orders, verdict, judgment, motion for new trial, points relied upon by appellant for reversal, and other papers filed by either party. These have been prepared in a separate volume and certified by the Clerk and are now in her office for inspection of counsel. These shall be printed in full and indexed with title and date of filing, except that plats or drawings attached as exhibits shall be omitted in printing.

2. The typewritten transcript of the official court reporter's notes shall be printed in full except as designated following:

(a) A complete index. This shall be printed in full, and the printed index shall make reference to both the original record and the printed record. The index prepared by the reporter, Mrs. Woodbury, and filed with the Clerk shall be printed.

(b) Volume I, being the transcript of the testimony of the witnesses of the appellant, Kimball Laundry Company. This shall be printed in full, with the exhibits inserted and copied where received or rejected, as shown in said Volume I on file with the Clerk.

(c) Volume II, being the transcript of the testimony of the witnesses of the government, the appellee herein; rebuttal testimony of the witnesses for the Kimball Laundry Company; instructions of the Court, pp. 1010-1042, 1043-1045; government's requested instructions, pp. 1042A-1042E; requested instructions of the Kimball Laundry Company, pp. 1042F-1042G; verdict of the jury, pp.

1046-1049; proceedings before the Court on August 8, 1946, in reference to withdrawal by the Kimball Laundry Company of part of the funds on deposit with the Registry of the Court during the pendency of appeal, pp. 1049A-1049D. This volume shall be printed in full, with the exhibits inserted and copied where received or rejected, as shown in said Volume II on file with the Clerk.

(d) Volume III, being exhibits of Kimball Laundry Company, on file with the Clerk. The following exhibits shall be printed in record *in full* where each is received or rejected, as shown in the said transcript of the testimony of the witnesses for the Kimball Laundry Company in Volume I on file with the Clerk:

Exhibits 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 19, 22(a), 23, 24, 41, 42, 43, 44, 45, 51, 52, 53, 54, 55, 56.

At the place where received or rejected in Volume I on file with the Clerk, the following exhibits in Volume III on file shall be described or explained by the printer as follows and not be printed in full:

[fol. 170] Exhibit 21: The first page shall be printed in full, after which the printer shall state: "Pages 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 are itemized statements of the machinery and equipment throughout the building, showing witness's appraisal of the cost when installed, value installed November 21, 1942 and value installed November 1945." Page 23, being a tabulation of all the pages of the exhibit, shall be printed in full.

Exhibit 21(a): Shall be described by the printer as: "Tabulation taken from Ex. 21, items not shown in column 3, that are either of no value or have been destroyed, $11,492.61."

Exhibit 25: Shall be described by the printer as: "Picture of the outside of the five-story Kimball Laundry Company at the time of taking."

Exhibit 26: Shall be described by the printer as: "Picture of the east side of the Kimball Laundry Company at the time of taking."

Exhibit 27: Shall be described by the printer as: "Picture of main entrance of Kimball Laundry Company at time of taking."

Exhibit 28: Shall be described by the printer as: "Itemization, consisting of several pages, of laundry service prices for the Kimball Laundry Company, itemized as to the various types and kinds of laundry."

Exhibit 29: Shall be described by the printer as: "Itemization, consisting of several pages, of dry cleaning prices for the army, cadets, R. O. T. C., and air corps uniforms, suifs, and civilian garments."

Exhibit 30: Shall be described by the printer as "Picture showing the concrete and steel type of construction of the Kimball Laundry Company building in the process of building."

Exhibit 31: Shall be described by the printer as: "Picture of electrical control room of the Kimball Laundry Company."

Exhibits 33 and 34: Shall be described by the printer as: "Pictures of the many rollers used in ironing."

Exhibit 35: Shall be described by the printer as: "Picture of the shirt department."

Exhibit 37: Shall be described by the printer as: "Picture of an ironing room of the Kimball Laundry Company."

Exhibit 38: Shall be described by the printer as: "Picture of washroom showing washers and dryers in operation."

Exhibit 39: Shall be described by the printer as: "Picture of washers in operation."

Exhibit 40: Shall be described by the printer as: "Picture of ironing devices in operation."

Exhibits 48, 49, and 50: Shall be described by the printer as "Exhibits 48, 49, and 50 are many pages of the itemization of the cost of reproduction, repair, and [fol. 171] replacement of the machinery and equipment in the Kimball Laundry Company by the witness Dahlquist. The item is identified from the same item numbers listed on the left side and used by both parties in the

presentation of the case. The description of the machine is given, the number of man hours estimated to do the work, and the cost of the parts and labor. This is itemized throughout the plant. Each item is given by number, followed by the cost of the parts, the labor, and the cost of reconnecting items that need reconnection. A summary is then given on p. 2 of Exhibit 49:

Summary of parts	$11,543.95
Summary of labor	18,676.45
Summary of reconnecting	4,089.02
Total	$34,309.42"

The index shows that Exhibit 8 is a duplicate of Exhibit 2; that Exhibit 9 is included in Exhibits 1 to 7; and that Exhibits 18, 20, 22, 32, 36, 46, and 47 were not offered by the Kimball Laundry Company. They need not be referred to or explained further in the printed record:

(e) Volume IV, being exhibits of the government, on file with the Clerk. The following exhibits from said Volume IV shall be printed in the record in full where each is received or rejected, as shown in the transcript of the testimony in Volume II on file with the Clerk:

Exhibits 1, 5(a), 8, 12, 12(a), 13, 14, 15, 17, 22, 23, and 24, as found and indexed in said Volume IV on file with the Clerk.

At the place where received or rejected in Volume II, on file, the following exhibits from said Volume IV shall be described or explained by the printer as follows and not be printed in full:

Exhibit 2: Shall be described by the printer as: "Payments made for services and repair to laundry and dry cleaning machinery and equipment at Omaha Quartermaster Laundry, 1502 Jones Street, Omaha 2, Nebraska, from 15 December 1942 to 15 December 1945. The exhibit shows the date and itemization of the items totalling $1,569.04. These items vary from the smallest of 75c to the largest of $85.00."

Exhibit 3: Shall be described by the printer as: "List showing replacement parts laundry and dry cleaning ma-

chinery at Omaha Quartermaster Laundry from December 1942 to December 1945. These items total $5,810.33."

Exhibit 4: Shall be described by the printer as: "List of machinery parts and expendable items in September 1944, totalling $2,985.72."

Exhibit 6: Shall be described by the printer as: "Payments made for services and repair to Kimball Laundry Company laundry and dry cleaning machinery and equipment at Omaha Quartermaster Laundry from 15 December 1942 to 7 March 1946. These itemizations total $1,346.18."

Exhibit 7: Shall be described by the printer as: "List showing replacement parts of laundry and dry cleaning machinery and equipment from December 1942 to March 1946, consisting of many small items totalling $3,771.72."

[fol. 172] Exhibit 9: Shall be described by the printer as: "Four pages of photostats of floor plans showing the location of machinery and equipment on each of the four upper floors of the Kimball Laundry Company at the time of the taking."

Exhibit 10: The first page and the last three pages of the exhibit shall be printed in full, after which the printer shall state: "This exhibit consists of a total of 151 pages, all similar in form to those printed and containing similar detailed estimates by witness of cost of repairing, replacing, and restoring machinery on the second and third floors of the building in question. The totals of these items are given elsewhere in Government's Exhibit 12."

Exhibit 11: The first page and the last three pages of this exhibit shall be printed in full, after which the printer shall state: "This exhibit consists of many additional pages, and is similar in form to that of Exhibit 10 but covers additional machinery on other floors, particularly the fourth and fifth floors of the building in question. The totals of this exhibit also are given elsewhere in Government's Exhibit 12."

Exhibit 16: Shall be described by the printer as: "The original architectural drawings dated December 1945 and January 1946 showing the location of various machinery

and equipment on the various floors of the Kimball Laundry Company on those dates."

Exhibit 18: The first and last pages of this exhibit shall be printed in full, after which the printer shall state: "This exhibit consists of a total of thirty pages all similar in form to the pages here printed, except only that the last page here printed also contains a summary. This exhibit is an itemization of United States Engineer Witnesses of what they considered necessary to restore the laundry machinery, dry cleaning machinery, equipment, fixtures, and miscellaneous items. All these items, as shown on the summary on the last page, total $20,471.27 as follows: cost of parts, $6,682.39; cost of labor, $8,297.88; cost of relocation, including connections, $5,491.00."

Exhibit 19: The first page shall be printed, after which the printer shall state: "The totals of each of the rooms are as follows:

	Cost Installed	Present Value
Panel room	$ 120.50	$ 62.50
Shop	873.00	617.50
Delivery room	933.00	535.00
Offices	12,139.06	8,956.16
Machinery, second floor	101,698.07	58,673.86
Fixtures, second floor	2,555.00	2,335.95
Miscellaneous, second floor	2,468.74	1,964.31
Machinery, third floor	87,676.68	57,465.12
Fixtures, third floor	2,649.75	2,036.65
Miscellaneous, third floor	3,311.62	2,462.31
Machinery, fourth floor	84,228.44	54,191.78
Fixtures, fourth floor	2,423.05	2,194.00
Miscellaneous, fourth floor	2,606.03	1,882.14
Machinery, fifth floor	21,569.27	15,463.30
Fixtures, fifth floor	2,527.47	1,768.00
Lunchroom, fifth floor	1,284.50	681.00
Miscellaneous, fifth floor	816.35	616.47
Totals	$329,880.53	$206,906.05"

[fol. 173] Exhibit 21: The printer shall print the first and last of the eight pages of the exhibit pertaining to the first floor; the last page of the thirteen pages pertaining to the second floor; the last page of the eighteen pages pertaining to the third floor; the last page of the eighteen pages pertaining to the fourth floor; and the last page of the eighteen pages pertaining to the fifth floor, after which the printer shall state: "This exhibit consists of a total of 75 sheets all similar in form to those here printed and containing itemized statements compiled by the witnesses thereon, either C. R. Crowder alone or C. R. Crowder and A. J. Pargett of the United States Engineers and showing details of material and labor, including man hours, rate per hour and total cost of labor and material, as estimated by these witnesses, covering the cost of restoring and replacing the items described in the exhibit."

Government's Exhibits 5 and 20 were not offered, therefore, they need not be referred to or explained further in the printed record. Dated at Omaha, Nebraska, this 3d day of February, 1947. (Signed by Attys. both sides.)

[fol. 174] CERTIFICATE

United States District Court, District of Nebraska, ss.

I, Mary A. Mullen, Clerk of the District Court of the United States within and for the District of Nebraska, do hereby certify that Notice of Appeal was filed by William J. Hotz, Attorney for Appellant, November 14, 1946, a copy of which is found on Page 164 hereof. A copy of Proof of Mailing, dated November 14, 1946, transmitting Notice of Appeal to the following named attorney:

Joseph T. Votava, United States Attorney, 306 Post Office Building, Omaha, Nebraska, as Counsel for Petitioner and Appellee herein, is shown on Page 166.

I further certify that the foregoing record has been made in conformance with (g) of Rule 75 of Rules of Civil Procedure for the District Courts of the United States, and that the same is a true and correct transcript

of material pleadings without unnecessary duplication of pleadings, on file and of record in the Omaha Division of said Court in the case entitled as follows:

United States of America, Petitioner, vs. Kimball Laundry Company, a corporation, and County Treasurer of Douglas County, Nebraska, Respondents. No. 404 Civil.

Witness my hand and the seal of said Court at Omaha, this 7th day of February, 1947.

MARY A. MULLEN, *Clerk,*

United States District Court,
District of Nebraska.

(Seal U. S. D. C.)

Filed Feb. 11, 1947 E. E. KOCH, *Clerk*
No. 13,494 U. S. C. C. A.

[fol. Vol. II, 1010] March 19, 1946

INSTRUCTIONS OF THE COURT

Gentlemen of the Jury: The lawyers have completed their labor in the case and the evidence is all in. It is now the duty and obligation of the Court to instruct you on the law. You will be governed by these instructions. It is my obligation to state the law correctly, and it is your obligation to apply the law to the evidence the best you can and return your verdict accordingly.

I think it will be helpful for me to tell you something about the nature of the case before we start talking about the law of the case. The right of eminent domain is a right that exists in every government, every civilized government. It is accepted throughout the world without question.

It is the power of government itself, the power to take private property for the welfare, protection and support of the government. The governmental function is not defined, it is not declared in the law—it is accepted. The taking of property, whose property to take, which citizen to annoy—if I may use that term—and which to leave

alone, depends upon who is running the government. If the head of the government is a dictator, he simply goes [fol. V. II, 1011] out and takes the property, and if the owner complains, he is in all probability put up against a stone wall and shot in the back. That is the only redress you get in that kind of a government.

Fortunately, we have a constitutional government. Your right to property, and mine, is no stronger than the government. The right to enjoy property, the right to own property, the right to use it, is all a matter for the government, and if the government, as I have said, consists of a dictator, or an emperor, or a generalissimo, there is no back-talk at all; the property is just taken. You see examples of it throughout the world.

That is what is known as the right of eminent domain. We have a constitutional government, and the constitution serves two purposes. It creates the structure upon which the government is built or functions. In the Bill of Rights it restricts the congress and other officials in certain respects. The provision of the constitution that we are considering is a restriction on the power of congress. It is not a grant of power. Congress does not pretend to grant its power of eminent domain, but congress does provide, by a legislative enactment, for the taking of private property for public use, and [fol. V. II, 1012] that is where this instruction comes in. When congress provides for the taking of property, the constitution says: You may not take private property without just compensation, so if congress undertook to pass a law restricting in any way that provision of the constitution, that is where the court steps in. That is what these courts are for, to protect people in their constitutional rights. As a consequence, congress does not pretend to reduce, and as a matter of fact, while they might, if they saw fit, make an appropriation beyond just compensation, they have never done so.

That is the kind of an action we have here. There has been no wrong committed to anyone; everyone here has acted clearly within their rights. No one questions the

right of the government to take this property. Property is the same as individuals. All that we have, our life, our property—everything—is subject to the government, so that when you get to considering the matter, this is not a matter of contract. It is not a matter of bartering. It is a matter of just compensation.

The terms or words that seem to stand out in this [fol. V. II, 1013] constitutional provision—here is the language: "nor shall private property be taken for public use without just compensation." As a consequence, it is the duty of the court to provide or enforce or compel the just compensation that the constitution provides.

We are controlled by the decisions of the Supreme Court of the United States, the highest court in the land. When the Supreme Court construes a provision of the constitution, such as this, it is binding on all the lesser courts, federal courts having to do with federal actions. That being so, we have here a situation where private property has been taken for public use. Congress enacted a law authorizing that to be done in this particular case and provided how it might be done, but did not go beyond that, and the provision of the law under which we are proceeding is the Second War Powers Act passed during the war; and I should say to you, moreover, that as a matter of law, in trying to reach what is just compensation we have to follow rules, in so far as we can, as laid down by the Supreme Court. The Supreme Court has said that this provision of the constitution means that the private owner shall have full and perfect equivalent [fol. V. II, 1014] in money of the property taken; the owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken. Those are words that you should not have much trouble with.

The court has gone further and said that the measure for juries and courts is the fair, reasonable market value of the property at the time it is taken. That rule worked very nicely in actions where they took the fee title. The question was, what was the fair, reasonable market value of the

land or property that was taken, and you would think that would be easy. In some cases it is very easy, particularly in the case of a farm out here, because there is a fair, market value for farms. If we were taking a herd of cattle, there is a fair market for cattle and we would have no trouble at all in arriving at just compensation.

The trouble, however, comes from the fact that there is no fair market price for the temporary use of laundries for a term of months.

A fair market is an open market. It must be a market where people may go, without restraint or restriction, to buy or sell property; a place where a man who has prop- [fol. V. II, 1015] erty that he does not need to sell, but is willing to sell, and the man who buys does not have to buy, but is willing to take the chance on the market. That is a fair market, and as I say, if it were a warehouse full of shoes, we could easily find out what the shoes were selling for, but when we come to deal with laundries, there is no evidence of anyone having rented a laundry for three and one-half years, or three years and seven months. There is no evidence of any laundry having been sold on the market.

That being so, you have to begin to look around to find another yardstick. We know that it was laundry property that was taken; we know there is, somewhere, a figure that is just compensation; but our problem is how to find it.

It is well to keep in mind the provision of congress that authorized this use that is causing the trouble, and the act, among other things provides:

"The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may [fol. V, II, 1016] cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that

shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act."

That was the authority for the taking. It is true it was taken in time of war. That does not make any difference. You must not take into consideration the necessity of the government. You are not to consider the fact that the owners of this property have a sentimental value there, having spent a lifetime working to build up the institution and they did not want to sell.

This case is being conducted in the nature of an inquest to determine just what our position is, and in making that inquest, we have to gather and consider any fact or circumstances that may be considered and keep within the line of just compensation. That means that the owners of the property shall be put in the same position they would have been in, so far as the property was concerned, at the time of taking. In other words, if their property [fol. V. II, 1017] were taken and used, it is a question of what was the market value of the property at the time it was taken. The property taken was the use of the laundry machinery, the building, the grounds, and everything connected therewith, except the trucks or delivery service that was not taken. Under the constitution and under the law, you can not make any allowance whatever for property that is not taken.

In search of a yardstick, I have permitted evidence here of the value of the property itself. Not that it was necessary for the purpose of the measure of damages, but it was a yardstick that we might consider in trying to find what was just. As I have said, there is no evidence of any sales, there is no evidence of any leases, or anything of that kind in connection with laundries.

In this case we can not allow any sentimental value. You can not take into consideration the necessity of the government. That has nothing to do with it. You can not take into consideration the fact that these brothers and their families did not want to sell their property or did not want to lease it.

The question is, what would be the fair and reasonable [fol. V. N, 1018] value of the property, or the use of the property, that was taken for a little better than a year, and then the extension of the lease from year to year for three years and six-tenths, and that should be measured by you as though this transaction were out on an open market between strangers, neither of whom were compelled to buy or sell and both of whom were able and willing. That is the way you must measure it.

I permitted evidence in this case as descriptive of the property, only, of the fact that it was a going concern. That is not the measure, whether it was a going concern or not, but it is descriptive of the condition and will give you a picture, an idea of the property, the use of which was taken. That was one reason. The fact that the Kimball Laundry Company undertook to place some element of value on the property, since it was a going concern, is not permissible, and is not competent. It is not the thing that we are appraising here or that we are holding the inquest on. The reason for that is that this is not a damage suit. It is not an action such as would be brought between individuals, based on a tort, where they would be entitled to recover everything they [fol. V. II, 1019] lost, good will, going concern, and damages, and that sort of thing. That is not the kind of an action we have here. The only reason is that the law does not provide for these things. If the constitution, instead of using the term "just compensation" had said, "shall be paid all damages of any kind and description," you would have a different kind of case. It does not say that. It simply says that you will allow just compensation as will put the property back in the same condition it was when it was taken, or enable the owners to do so by making them a fair allowance—no matter what you call it, whether you call it interest on his money, or rental, or something else—a fair allowance for the use of their property while it was taken away from them, without reference to who they are or where they came from. That is the way you have to measure it up. The trouble is just how we shall get at it.

In this case I properly permitted the owners of the property to give their opinion of the value of the property. It developed in the cross-examination of these owners, when they were fixing the figures that they used, that they were considering elements they had in mind that [fol. V. II, 1020] were not proper to be considered.

The first witness in that respect is Mr. A. L. Jacobberger. On his cross-examination, after fixing what he considered a fair allowance, he was asked what the elements were that he had in mind and he referred to the fact that there was additional expense he would be put to as a result of the taking of the business. In this expense there were many different items, some of them being storage of merchandise that was not taken, storage of trucks that they had been using on their deliveries, storage of customers' clothing, and these items he had considered in making up his figure. He also testified that as a result of the taking he had taken into consideration that he had been put to the expense of appraisals and audits and matters of that kind, expense that ran into the neighborhood of eight or nine thousand dollars. None of these items are allowable in this action because they are personal to the owner. The property taken has nothing to do with this, and so I instruct you that these elements Mr. A. L. Jacobberger has referred to should not be considered by you in appraising his opinion of the value of [fol. V. II, 1021] the property, and you should not consider any of these matters he has seemingly included in making up his sum total.

In addition to Mr. A. L. Jacobberger, I find that Mr. Harry Jacobberger, in his cross-examination, referred to the elements he had taken into consideration. He testified that he had taken into consideration the fact that the plant was a going concern. That is not an element of just compensation, and you are instructed to disregard it.

Mr. Fred Jacobberger, when he testified, was asked what elements he took into consideration and among other things he said he thought they were entitled to an amount he fixed, stating that he would certainly ask it of any-

one who wanted to rent the place from him. He also testified to a figure for taxes, insurance and a few minor expenses, such as storage of these trucks. These are elements you cannot take into consideration. You may consider taxes and insurance in a collateral way in trying to get at a rental value.

With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us [fol. V. II, 1022] reach that figure. We must approach it, however, from such evidence as we can obtain. While you gentlemen are not appraisers, you are jurors, who are required under your oath to try the case on the evidence introduced here and you are required to consider all of the evidence in arriving at your verdict. That does not mean that because you are jurors you should disregard common sense. You are not required to shut your eyes to what you see around you. You are required to take your experience, your knowledge of affairs, your better judgment, and use all these faculties when you come to weigh and consider the evidence that has been introduced here and evaluate it.

So, we come to the question of how to arrive at it. The law requires us to appraise or hold an inquest on the value of the property that was taken on the 22nd day of November, 1942. That was the day the property was taken and that was the day from which the just compensation should be paid and will be paid. Here was a lease providing for an extension. It has been extended three times and the term of the use of the property has been three years and six-tenths of a year. During that time, according to the evidence, this property has been [fol. V. II, 1023] depreciated. The question is, how much? We permitted evidence from every source obtainable. The owners of the property say it has been depreciated so much. They called witnesses to establish and support their contention. The government says it has been damaged, but not that much. Just compensation requires that the laundry company shall be put in a pecuniary posi-

tion such as they had in the first place and they should not be out any money.

The question is, how can we determine it? Some witnesses testified about the value of the property at the time it was taken and then appraised the value of the property as of this date. Other witnesses came in and said that the property was damaged, stating the damage and giving certain sums it would take to repair the property and put it back in as good condition as it was when it was taken. They prepared statements that were called to your attention. You should get together and analyze and compare these statements as to any discrepancies.

There is the question of the damage to the building. There is some excessive damage. You have heard the evidence. The only way you can reach that is to make [fol. V. II, 1024] it good, repair the building. It has to be repaired. What is it going to cost? That applies to other conditions down there, what is it going to cost to repair?

These are all elements you must gather and get together to arrive at the one important thing: How much money will it take to pay the Kimball Laundry for the use of the property which was theirs?

You have listened to the evidence of the witnesses pertaining to the wear and tear on the machinery, wear and tear on the building, wear and tear on the property. You should take that into consideration, but you must not double up. If you fix a value on the basis of rental for the use of the property for three and one-half years and ordinary wear and tear, then you should not add that ordinary wear and tear into the item of damages for replacing the building. While, on the other hand, if you conclude that the best way to arrive at your verdict is to find out what it would cost to put their building in the same condition it was when it was taken, and then conclude to figure on what would be a fair price for the annual use of the property, or the rental, whichever you prefer, you should then take into consideration the value [fol. V. II, 1025] of the building and property down there,

as has been suggested and argued, and it seems reasonable enough; not the value of the use, but the value of all the property. That is what an ordinary man would do if he were starting out to acquire a place for three years and a half. If he were attempting to buy the property, he would find out what it was worth. The only way you can find out what it is worth is to get someone who is an expert, who knows about values, if you can. If you can not find an expert who is in a position to qualify and tell you that it is worth so much money, then you have to figure it out for yourself by considering what it cost when it was built, how it has been used, what its capacity is—all of these things that will occur to you when you are trying to arrive at a value. Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it whenever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here.

When you make up your figure on an annual rental basis, you must figure on the usual wear and tear that [fol. V. II, 1026] comes with the use. That is what you pay for. Buildings and property wear out through this ordinary wear and tear, and you will figure that; but, on the extraordinary damages, I am going to ask you to bring that in as a separate item in the verdict I shall ask you to return. I will ask you to bring in one general verdict covering the entire use of the property, just compensation. In that you consider all of the elements, figuring what it would cost to put the property back as it was, as near as you can, allowing just compensation for the use of the property, without any sentimental values, without any good will, or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army. It is just one of those things that come in government. The fortunate thing is that we all live in a government

where just compensation is paid for property that is taken of the private citizen. That is a fact we are all proud of and that is a right that we must protect. The [fol. V. H, 1027] way to protect it is for courts and juries to stand up under all circumstances, without reference to who the parties are or from whence they came, whether it is the government or the individual, whether it is the rich man or the poor man, to see that justice is done, the right, honest thing, and that is what we are here for.

The question has come up of the possibility of there being additional damage to what we have now. There is the possibility that the property may not be turned back immediately, and while it is yet in the possession of the government, there is the contingency that additional damage might accrue. For example, after you bring in your verdict, or maybe next month, they may start moving around some of these big machines, the ropes might slip, or the thing might tumble down and go through the floors while it is yet in the possession of the government. The Kimball Laundry is entitled to just compensation for such damage in this court and in this case, but we are not in a position to know that now. There is the other contingency that maybe the government will decide to keep the property another year, which [fol. V. II, 1028] they have a right to do under this lease if they see fit, but they have not done so, and if they do take it for another year, the Kimball Laundry Company is entitled, in this case, to have compensation for that additional time or that possible contingency, so I am instructing you gentlemen that you must disregard both of these items now. I will make an order that these two contingent items shall be passed and that I shall keep jurisdiction of the case to call a jury again, if need be, to appraise any additional damage; so, pay no heed to that.

Keep in mind that you must not have duplication. There is evidence, for example, on both sides, on the question of ordinary wear and tear. You can take either one you

wish, but you can take only one. You can not take two. If, in making up your figure, you put the element of wear and tear of the property in your item of the annual rental or annual use, or value of the use—whichever you prefer—then, of course, you must not put it over on the damage side. If you put it on the damage side, take it off the other side.

I think I have said to you what I feel I should, but [fol. V. II, 1029] let me check a moment, gentlemen, if you please.

We have prepared a verdict that we will send to you for your use in the jury room. The first paragraph is the general verdict, the total sum that the jury allows, every element that is permissible under the law for the use of the property during the time it was taken. Then we have some specific findings that I find necessary for the future use of the court and that is in connection with these possible contingent claims and for the purpose of figuring interest, which is the duty of the court. The jury will pay no attention to interest at all. Your question is the value of the property at the time it was taken, not now. It is the value of the use of the property and when we get your figures the court will then allow such interest as the law permits. So, you will make a general finding of all of the damages that you conclude to allow and also make a special finding of the annual rental or the amount that you determine for the use of the property per annum. Sometimes we talk of it as the annual rental. Well, it has some of the elements of rental, and [fol. V. II, 1030] some of it does not. Rental comes more nearly expressing what is meant by this allowance. You will make a special item of that, and you will determine the compensation payable by the petitioner for failure to return the property to respondents in the condition in which it was on November 22, 1942, to be the sum of $_____, in addition to the total rental. There are three items in there to make up general damages.

When you go to your jury room you will select one of your number as your foreman and when you arrive at

a verdict he will sign it and put in the amounts, and date the verdict on the second page.

Are there exceptions, gentlemen?

Mr. Hotz: There are exceptions, if Your Honor please, that are rather covered by those general instructions I handed you.

The Court: I have given some of the requested instructions. Maybe I have rambled a little in my statement. These perhaps are in better form. In addition to what I have said, while it is the duty of the judge to charge the jury on the law, counsel on either side has the right and priyilege, and it is their duty, to request the court to give certain instructions as to the law and [fol. V. II, 1031] I have concluded here to give you some of these instructions they have requested. They are in a little different language than I used, and I am now going to give some of them.

These are instructions requested by the Kimball Laundry Company:

You are instructed that "just compensation," in the constitutional provision requiring that just compensation be given for private property taken for public use, means the full and perfect equivalent in money of property taken, so that the owner will be put in as good position pecuniarily as he would have occupied if his property had not been taken.

In reference to the machinery and equipment and power plant, you are instructed that if you find any part thereof to have been destroyed or depreciated in value by the taking, the laundry company is entitled to compensation. The owners' rights in these properties are no less within the meaning of the Fifth Amendment than their rights in the land and structures thereon erected. And it matters not whether these items of machinery and equipment were taken over by the government or destroyed since: Destruction is the same as taking. This is true whether the fixtures and equipment would be considered, [fol. V. II, 1032] such as between vendor and vendee, or as trade fixtures. In respect of them, the owner whose

occupancy is taken is entitled to compensation for destruction, damages, or depreciated value. And since these items of machinery and equipment are property distinct from the right of occupancy, such compensation should be awarded, not as part of but in addition to the value of the occupancy as such.

Here are some instructions that have been requested by the government and they are likewise entitled to consideration because they are given to you by the court and correctly state the law:

The jury are instructed that the just compensation payable by the United States in this proceeding is the fair annual rental value for the use of the physical property of the Kimball Laundry Company as described in the petition filed herein, consisting of the real estate, the buildings and improvements thereon, and all personal property located thereon and therein and used in connection with said laundry, excepting only delivery equipment, for the term from November 22, 1942, to June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter during the present [fol. V-II, 1033] national emergency, as determined by the President of the United States.

The jury are instructed that the owner is entitled to fair annual rental for the use of the physical property taken, and also the owner is entitled to have the physical property returned in the same condition in which it was on November 22, 1942, less and except, however, for damage caused by the elements or by circumstances over which the United States, its representatives, agents and employees have no control and less and except damage resulting from ordinary normal wear and tear, and if the petitioner shall fail to return the property in such condition, the owner is entitled to just compensation. If you find from all the evidence that the property will not be returned to the owner in the condition in which it was on November 22, 1942, less and except, however, for damage caused by the elements or by circumstances over which the United States, its representatives, agents and employees have no control and less and except damage re-

sulting from ordinary normal wear and tear, then you shall also determine and allow, either included in and as a part of the fair annual rental, or as a separate amount, [fol. V. II, 1034] the just compensation payable by the petitioner for the failure to so return the property.

The jury are instructed that in the event the Government shall fail to return the physical property to the owner in the condition in which it was on November 22, 1942, the just compensation payable by the United States shall include the fair and reasonable cost of restoring the property to the condition in which it was on said date, less and except for damage by the elements or by circumstances over which the United States, its agents, representatives and employees have no control and save and except for ordinary, normal wear and tear. Such fair and reasonable cost may be included in the fair annual rental for the physical property or allowed as a separate amount, but any duplication of such allowance must be avoided.

You have been told, and are instructed again, that the fair annual rental should be determined as of the date of November 22, 1942.

The jury are instructed that the just compensation to be paid in this case is the value of the property taken, in this case, the right to use the physical property. Only [fol. V. II, 1035] in the sense that the owner is to receive this value is the owner to be put in as good a position financially or pecuniarily as if his property has not been taken. This value is not the value to the owner for his particular purposes or to the condemnor for some special use, but a so-called "market value." Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are not to be considered in determining just compensation in this proceeding. Interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily, or the need of the government

for the property are not to be considered and are not to be the basis for the allowance of just compensation. You will, therefore, disregard all evidence of such items.

The jury are instructed that no consideration shall be given to or allowance of just compensation made for any litigation, auditing and appraisal expense incurred by the owner and evidence of such expense shall be disregarded. [fol. V. II, 1036] Now, do you wish to take exceptions? You may take the jury out in the hall, Mr. Bailiff.

KIMBALL LAUNDRY COMPANY'S EXCEPTIONS TO COURT'S INSTRUCTIONS

Mr. Hotz: The respondent, Kimball Laundry Company, excepts to that portion of the Court's instructions which referred to the words "going concern" taken from the testimony of Mr. A. L. Jacobberger and Mr. Harry Jacobberger, for the reason that in their testimony they specifically excluded, under the rulings of the Court, all reference to trade routes, business and good will, and so stated in their testimony.

2. That the instructions are not explicit enough in reference to the matter of the element of damage based upon the value of the property, especially the laundry machinery and equipment as it existed in November of 1942, and at the present time. While the instruction was given, it seems to counsel for Kimball Laundry Company that it was detracted from and modified in the subsequent instruction that seemed to leave to the jury no other alternative but the repair items to place the property in the condition that it was in 1942.

3. That the reference by the Court to consequential damages not being permitted is contrary to the law and [fol. V. II, 1037] the decisions of the United States Circuit Court of Appeals for this circuit and that consequential damages which inhere in and are directly connected with property and are destroyed are a part thereof and become an element of damage for the consideration of the jury.

4. That the word "rental" as used by the Court in the instructions and also as referred to in the general ver-

dict of the jury submitted by the Court, is not a proper term either under the statute or the decisions, and while it may be used as an illustration, it is contrary to law, as it all is a matter of damage for use, whether temporary or permanent.

5. The Kimball Laundry Company further excepts to the failure of the Court to give all of the instructions requested by the Kimball Laundry Company, being numbers—

The Court: You will get specific exceptions on those.

Mr. Hotz: We except to the instructions given by the court from instructions suggested by the government, number 1, 2, 3, 4, 6 and 8, and especially in connection with Instruction 6, because of the element of consequential [fol. V. II, 1038] damages therein referred to. The general exception is made that the court has failed and refused at this time and throughout the trial to recognize as an element of damage the destruction of the trade routes and the customers lists because of their contractual relationship to the Kimball Laundry Company and as an element of damage inhered in and as a part of the property.

The Kimball Laundry Company also objects to the request for the findings of different elements to make up the total damage, it being the law that the damage should be fixed in one lump sum and that the only purpose in arriving at the separate elements of damage is to aid in arriving at the one sum of damages.

The Kimball Laundry also takes exception to the court retaining jurisdiction of this cause.

The Court: I should think you would thank me for that. If you elect, you can take your case to the court of claims. Is that all?

Mr. Hotz: Yes.

The Court: The exceptions will be noted and overruled and the instructions in that regard will stand as they are. Mr. Murphy, do you have exceptions?

[fol. V. II, 1039] Mr. Murphy: Just a couple of brief matters. To keep the record straight, I note the court did not give our requested instructions 5 and 7. I presume they are so noted as being rejected and exception

allowed as a matter of course to those?

The Court: Yes. I feel they are covered by my instructions.

Mr. Murphy: There was one other item. The government excepts to that part of the court's instructions with reference to the elimination of certain elements testified to by A. L. Jacobberger and Harry Jacobberger in the failure of the court to include among those items to be eliminated by the jury from consideration, an element of fifty to seventy-five thousand dollars, testified to by both witnesses and included by them as covering some loss after the property should be turned back to them.

The Court: I thought I specifically referred to them.

Mr. Murphy: You covered all the other items, but you did not mention that, except in your final charge you did.

The Court: I took it from their consideration. I said I was reserving jurisdiction on that item, if it should [fol. V. II, 1040] arise.

Mr. Murphy: But the jury have heard these two witnesses testify to the amount of their claim and specifically including the specific item at a specific figure.

ADDITIONAL INSTRUCTIONS GIVEN JURY BY COURT

The Court: Bring the jury in.

Gentlemen, my attention has been called particularly to the fact that there was testimony offered by Mr. A. L. Jacobberger and Mr. Harry Jacobberger with reference to an item of $70,000.00 which they said would cover the use of the property while they were putting it back in shape. I withdrew that question from your consideration by retaining jurisdiction and any question that may arise hereafter as to any damage in that respect, the court will then be in a position to take care of. You can not anticipate now that there will be any such occasion arise. Have I made myself clear? That was the item of $70,000.00 that was testified to, which they said would be for the use of the property after the 30th day of June, or after it was turned over to them. In making

up your allowance for the use of this property, you will figure it up to the 30th day of June.

[fol. V. II, 1041] There is one other thing that I neglected to instruct you upon and that is your function as jurors. You gentlemen are the sole judges of what the facts are. You are the sole judges of the testimony, what it is, what it is worth, what it proves. You are the sole judges of the witnesses, how they are to be estimated. You have a right to consider, in deciding upon the testimony of the witnesses, the means that each of them has for knowing, remembering or stating that which he undertakes to state, the capability of the witness to know and remember and relate. You have a right to consider the demeanor, the conduct of the witness in testifying. You have a right to consider the interest of any witness in testifying, whatever that interest may be, whether it is financial or otherwise. And if there is any such interest, you have a right to consider whether that interest had any influence in the testimony of the witness, that was given, or whether the testimony is that of one who is uninfluenced by any interest, even though the interest is possessed.

Now, gentlemen, you twelve men, regular jurors, are you all in good health? Does anyone feel indisposed? Do you feel strong enough to go on to the end without the [fol. V. II, 1042] assistance of our good friends over here who have been waiting to take over if anything happened. To the alternates: Now, gentlemen, the time for parting between us is now. I want to thank you indeed for your assistance to the court and your services as alternates. You have been very attentive and I am sure you would have made excellent jurors, but we can have only twelve. The other men were called first, so I am now excusing both of you.

Alternate Jurors: Thank you very much.

The Court: Now, gentlemen, you will retire with the deputy marshal for your deliberations. It is five o'clock. I will arrange to let you go to dinner now and then come back immediately after your dinner and organize and

start your deliberations. You are not going to be kept together. You are all responsible and honorable gentlemen. We will expect you to go on with your deliberations, but when time comes to retire for the night the marshal will see that you can go. We are not going to keep you together. It is too much of a hardship unless there is some reason for it, and it does not appear that there is any such reason. That is all, now, gentlemen.

[fol. V. II, 1042-A] GOVERNMENT'S REQUESTED INSTRUCTIONS.

No. I (Given)

The jury are instructed that the just compensation payable by the United States in this proceeding is the fair annual rental value for the use of the physical property of the Kimball Laundry Company as described in the petition filed herein, consisting of the real estate, the buildings and improvements thereon, and all personal property located thereon and therein and used in connection with the said laundry, excepting only delivery equipment, for the term from November 22, 1942, to June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter during the present national emergency, as determined by the President of the United States.

No. II. (Given)

The jury are instructed that the owner is entitled to fair annual rental for the use of the physical property taken, and also the owner is entitled to have the physical property returned in the same condition in which it was on November 22, 1942, less and except, however, for damage caused by the elements or by circumstances over which the United States, its representatives, agents and employees have no control and less and except damage [fol. V. II, 1042-B] resulting from ordinary normal wear and tear, and if the petitioner shall fail to return the property in such condition, the owner is entitled to just compensation. If you find from all the evidence that the property will not be returned to the owner in the condition in which it was on November 22, 1942, less and

except, however, for damage caused by the elements or by circumstances over which the United States, its representatives, agents and employees have no control and less and except damage resulting from ordinary normal wear and tear, then you shall also determine and allow, either included in and as a part of the fair annual rental, or as a separate amount, the just compensation payable by the petitioner for the failure to so return the property.

No. III. (Given)

The jury are instructed that in the event the Government shall fail to return the physical property to the owner in the condition in which it was on November 22, 1942, the just compensation payable by the United States shall include the fair and reasonable cost of restoring the property to the condition in which it was on said date, less and except for damage by the elements or by circumstances over which the United States, its agents, representatives and employees have no control and save [fol. V. II, 1042-B] and except for ordinary normal wear and tear. Such fair and reasonable cost may be included in the fair annual rental for the physical property or allowed as a separate amount, but any duplication of such allowance must be avoided.

No. IV. (Given)

The jury are instructed that the fair annual rental shall be determined as of November 22, 1942.

No. V. (Not Given)

The jury are instructed that since it is known that the property has been taken by the government for the period from November 22, 1942, to June 30, 1946, and since there is evidence that there may be physical damage to the property taken, in excess of ordinary normal wear and tear, you may return a verdict in a lump sum of just compensation computed upon the basis of fair annual rental for 3.6 years, but if you return a lump sum verdict, you shall also return a special verdict of fair rental payable annually for use by the Court in determining any interest to which the owners may be entitled.

No. VI. (Given)

The jury are instructed that the just compensation to be paid in this case is the value of the property taken, [fol. V. II, 1042-D] in this case, the right to use the physical property. Only in the sense that the owner is to receive this value is the owner to be put in as good a position financially or pecuniarily as if his property has not been taken. This value is not the value to the owner for his particular purposes or to the condemnor for some special use, but a so-called "market value." Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are not to be considered in determining just compensation in this proceeding. Interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily, or the need of the government for the property are not to be considered and are not to be the basis for the allowance of just compensation. You will, therefore, disregard all evidence of such items.

No. VII. (Not Given)

The jury are instructed that there has been evidence offered by both parties with respect to depreciation. The term "depreciation" has various meanings and is sus- [fol. V. II, 1042-E] ceptible of different interpretations. Also, there are various methods of computing depreciation for different purposes, such as for business accounting and income tax deductions, and for the determination of just compensation. The jury are instructed that in determining the fair annual rental in this case, you shall give consideration to and make an allowance of compensation only for depreciation represented by physical deterioration, wear and tear, damage by the elements, loss in value due to age and passage of time; obsolescence, all to the physical property, but you must neither consider nor allow compensation for any so-called depreciation representing business accounting or income tax deduc-

tions which might, as indicated by some of the evidence offered by the owners, be a benefit or profit to the owners.

No. VIII. (Given)

The jury are instructed that no consideration shall be given to or allowance of just compensation made for any litigation, auditing and appraisal expense incurred by the owner and evidence of such expense shall be disregarded.

[fol. V. II, 1042-F] KIMBALL LAUNDRY COMPANY'S REQUESTED INSTRUCTIONS

No. I (Given)

You are instructed that "just compensation," in the constitutional provision requiring that just compensation be given for private property taken for public use, means the full and perfect equivalent in money of property taken, so that the owner will be put in as good position pecuniarily as he would have occupied if his property had not been taken.

No. II. (Not Given)

In your deliberations you may consider that acquisition or taking of less than the absolute title, such as a temporary use in this case, if its effects are so complete as to deprive the owner of all or most of its interest in the subject matter for all practical purposes, amounts to a total permanent taking; and if you so find, then your verdict should be for the full value of all the property as it was on November 22, 1942.

No. III. (Not Given)

The jury in a condemnation case, such as the one before you for your verdict, is never required to accept as conclusive the estimates of value made by expert witnesses on either side. There ordinarily is in such cases [fol. V. II, 1042-G] some general testimony as to location, character, and use of the property; and other pertinent facts usually are also developed on direct or cross-examination of witnesses. All of this the jury is entitled to consider, together with any reasonable inferences

which may be made therefrom, and it may properly exercise its own deliberate judgment on the amount of the damages, from the evidence as a whole in the light of the jurors' common knowledge and ordinary experience, giving to the estimates of expert witnesses only such weight as it conscientiously feels they are entitled to receive under all the circumstances.

No. IV. (Not Given)

This being Nebraska property, consideration must be given by you to the additional element of damages provided by the Nebraska Constitution, which provides that property shall not be taken or damaged for public use without just compensation. This you may take to mean all actual damages resulting from the exercise of eminent domain which diminish market value of private property. Such words were intended to give to the owner the right of recovery which did not previously exist and not to restrict remedy previously in the words just compensation.

[fol. V. H, 1042-H] No. V. (Not Given)

The compensation to which the Kimball Laundry Company is entitled in these proceedings rests on fair principles, which means that the laundry company shall be put in as good position pecuniarily as it would have been if its property had not been taken by the Government. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered in determining compensation, not necessarily as the measure of value, but to the full extent that the prospective demand for such use affects the market value while the property is privately held. The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It means that the owner shall be put in as good a position with your money award as the laundry company would have been if its property had not been taken. This you may apply to the temporary use taken by the Government, giving full consideration to all elements for that taking which to your minds seems just and fair to the Kimball Laundry Company.

No. VI. (Not Given)

You are instructed in a condemnation proceedings when you arrive in your deliberation at the value of the property [fol. V. II, 1042-I] as a unit, to consider its special use to the Kimball Laundry Company as a laundry and dry cleaning establishment; and the criterion or test of what the value was on November 22, 1942, is not what the property is worth to the condemnor but its value to the condemnee, Kimball Laundry Company. The question is what has the owner lost, not what has the taker gained.

No. VII. (Given)

In reference to the machinery and equipment and power plant, you are instructed that if you find any part thereof to have been destroyed or depreciated in value by the taking, the laundry company is entitled to compensation. The owners' rights in these properties are no less within the meaning of the Fifth Amendment than their rights in the land and structure thereon erected. And it matters not whether these items of machinery and equipment were taken over by the Government or destroyed since: Destruction is the same as taking. This is true whether the fixtures and equipment would be considered, such as between vendor and vendee, or as trade fixtures. In respect of them, the owner whose occupancy is taken is entitled to compensation for destruction, damages, or depreciated value. And since these items of machinery and [fol. V. II, 1042-J] equipment are property distinct from the right of occupancy, such compensation should be awarded, not as part of but in addition to the value of the occupancy as such.

No. VIII. (Not Given)

You are further instructed that where past profits may be shown with a reasonable degree of certainty, you may consider such evidence not as an independent or separate element of damage, but for the purpose of showing the value peculiar to the Kimball Laundry Company and its location as it was on the day of the taking. Such evidence is admissible as elements which may be taken into account in considering the value of the temporary use

taken. If you find that the property taken is one which because of certain peculiar qualities in and of itself and actually produces a revenue or enables the operator directly to make a regular income in the conduct of his business, aside from the results of personal management, then these are elements which may be taken into account by you in fixing the value of the period from November 22, 1942, until this time. You may also consider that the Kimball Laundry Company may recover for gains prevented, as well as for losses sustained, if you find that the damages are not only certain but are the natural and probable result of the taking.

[fol. V. II, 1042-K] No. IX (Not Given)

You are further instructed that in a condemnation proceedings you should not be governed by any formula which any of the witnesses have adopted to arrive at their idea of just compensation. In determining the market value which shall govern your award for the temporary use of said property for the period in controversy, all uses for which the property was suitable must be considered, including the highest and most profitable use for which the property was likely to be needed and was being used. You should also consider that no intelligent buyer would part with the amount of cash required to buy the property on a plan of so-called capitalization values, particularly if the supporting data was largely estimated, because such method of ascertaining cash market values, which is the recognized equivalent of just compensation, is uniformly rejected by the courts as being too speculative.

No. X. (Not Given)

You are instructed that the Government took from the Kimball Laundry Company the temporary use of land and the personal property thereon or used in connection therewith. You are instructed that the term included the Kimball Laundry Company's property on the north-
[fol. V. II, 1042-L] west corner of 15th and Jones Streets, and that it covered the land, the five-story building, all the machinery and equipment contained therein, and the

power plant and power equipment, and all personal property used thereon or connected therewith, excepting the Kimball Laundry Company's delivery trucks; that said property at the time of the taking was run and operated by the Kimball Laundry Company as a fully equipped modern and efficient laundry and dry cleaning establishment, located in the business section of the City of Omaha, and that said property was of such capacity as to service the volume of business necessary for the Government needs, and that all these elements of value should be combined by you in arriving at the value of said plant as a unit on November 22, 1942. And in arriving at your conclusions of value you shall take into consideration the trade routes established by the Kimball Laundry Company as distinguished from the loss of business or good will. If you find that said trade routes, both residential and commercial and others, had a definite intrinsic value, readily determinable; that the Kimball Laundry Company was under obligation to service said trade route customers and was doing so at the time of the taking; and that by the taking these routes were destroyed and became valueless to the Kimball Laundry Company—[fol. V. II, 1042-M] then you shall include that trade route item, in addition to all other items of value, in making up your award for damages and include the same in the total.

No. XI. (Not Given)

You are further instructed that in arriving at just compensation to be paid to the Kimball Laundry, you may take into consideration the value of the customers' routes, the number of customers, the volume of business; and if you find that such customers' routes and customers had a value which inhered in the Kimball Laundry Company's property as a part thereof and that the same was damaged or destroyed directly by the taking, then you shall find for the Kimball Laundry Company to the extent of the value of the routes so destroyed in the taking, even though you find the Government had no occasion to take and did not take or operate said laundry's customers' routes.

No. XII. (Not Given)

You are instructed to find the total value, rather than the separate value, of the parts of the Kimball Laundry Company that inhered in the property at the time of the taking. In that regard there is before you separate evidence of the value of the real estate, the machinery, the [fol. V. II, 1042-N]. equipment, the power plant, and other elements, each separately valued. These are before you separately only to show the value of the total or the value of the whole laundry as existed on November 22, 1942 when taken by the government, and you may not value each item separately and add them to make up the whole, but instead you must value the whole plant as a going unit, and determine its value in dollars and cents for the purpose of arriving at just compensation.

No. XIII. (Not Given)

You are instructed that it is not necessary for you to gauge the damages for just compensation to be paid by the government in terms of a percentage of the land, a percentage of the building, and a percentage of the equipment, as the measure of your verdict, but you may gauge the full measure of your award based upon what you consider fair and just compensation for the taking of the whole. In determining just compensation to be awarded for this property for the period in controversy, you may consider the after-value of the property and subtract it from the before-value; that is, the value as it existed on November 22, 1942, and subtract the value of the property at this time.

[fol. V. II, 1042-O] No. XIV. (Not Given)

You are instructed that the petition filed by the Government in this case condemned a temporary use of said premises, and that the property sought to be condemned was only the physical assets, exclusive of trade routes and business. However, if you find from the evidence that the effect of the taking, even though the petition states "temporary use," actually resulted in appropriating the Kimball Laundry Company as a going business with the result in effect that said property was com-

pletely taken from the Kimball Laundry Company, then you are instructed to find the fair, reasonable market value of the Kimball Laundry Company at the time of the taking on November 22, 1942, with all the elements that go to make up the value of a large going laundry and dry cleaning business and render judgment in favor of the Kimball Laundry Company for said amount. In such event you are instructed that the real and personal property would remain as an asset of the Government for the purpose of resale to the Kimball Laundry Company or to some other purchaser or to remain the property of the federal Government if it so desires, in which contingencies you need not be concerned in this action.

[fol. V. II, 1043] FURTHER INSTRUCTIONS OF THE COURT

March 20, 1946.

The Court: I am informed, gentlemen of the jury, by the marshal that you are having some difficulty with this form of verdict that was submitted. Do I understand you have arrived at a verdict and it is just a matter of getting it in proper form?

The Foreman of the Jury: Not exactly, Your Honor.

The Court: You have not, but you want further instructions as to the form of the verdict?

The Foreman of the Jury: Yes.

The Court: Very well. Open it and I will read it. The first item is General Verdict, and down at the bottom of that paragraph, just above Special Findings, there is a blank space in which you are to put the total sum that you allow as just compensation. That is the grand total of everything, the money that will be paid. Now, the special finding that the court has especially required is No. 2, and on the last line where there is a blank space, you put in the amount that you find for one year's rental. On the next blank space you multiply the amount you find for one year by three and six-tenths years, which is the term that the property has been taken and used, so that would be three and six-tenths times the amount you find as one year's rental, and you fill that in on the

[fol. V. H, 1044] top blank space on the second page. Now, in Item 3, you fill in there the amount that you find to be necessary or proper or required to put all of the property that was used back in the same condition that it was when it was taken on November 22, 1942. Now, then, so as to check, when you get the finding of the total rental for three and six-tenths years, you add that item to the damages, or the use, or whatever you wish to consider it, to restore the building, and these two items, when added, make up your general verdict and must correspond with your general finding. Have I made myself clear? Is there anyone who still does not understand? It is a little difficult because, as I explained to you, it is in the nature of an inquest and it is not like a general finding for damage. We must follow the provisions of the law in the taking of property of this kind and that is why it is a little complicated. I am sure, if you will keep in mind what I have now said to you, you will have no difficulty in getting the amounts. I want to know the annual rental for the property in the event it should be kept longer. I want to know the total damages that you allow for breakage or loss or wear or ex-
[fol. V. H, 1045] cessive wear or destruction, and all that sort of thing. In other words, to put the building and grounds back as they were. That is, Item 2, which is three and six-tenths times the annual rental you find, plus Item 3, which is the total damages, when put together go to make up the first item. Is that satisfactory to you gentlemen?

Mr. Diesing: Yes, Your Honor.

The Court: How about you, Mr. Murphy?

Mr. Murphy: I think that covers it.

The Court: Let the record so show and you may now retire for further deliberation.

VERDICT OF THE JURY (Infra 95)

The Court: Have you arrived at a verdict, gentlemen?

The Foreman of the Jury: Yes.

The Court: The foreman will kindly hand it to the clerk. The clerk will read the verdict.

The Clerk: (Reading) In the District Court of the United States for the District of Nebraska, Omaha Division. United States of America, Petitioner, against Kimball Laundry Company, a corporation, et al, Respondents. Number 404 Civil. Verdict of Jury. [See page infra 95 this volume, date of verdict March 20, 1947.]

[Official stenographer's Certificate of Correctness of these pages 150 to 180 is in Or. Vol. I.]

LIBRARY
SUPREME COURT, U.S.

Vol. II

TRANSCRIPT OF RECORD

(Pages 181 to 460)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

VOLUME II.

TRANSCRIPT OF RECORD

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 13494

CIVIL

KIMBALL LAUNDRY COMPANY, A Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

FILED FEBRUARY 11, 1947

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[This volume II contains the testimony introduced and proceedings at the trial by the respondent, Kimball Laundry Co., appellant in U. S. C. C. A.]

Printed Record

FILED

JUL - 2 1947

E. H. KOCH

CLERK

EXPLANATION OF RECORDS

A Condemnation Case from U. S. D. C. of Nebraska, Omaha Division

The printed record on the appeal to U. S. C. C. A. consists of *three* separate, bound volumes as follows:

Volume I. Pages 1 to 180	The filings and entries in the office of the Clerk of the U. S. D. C. at Omaha; court's instructions; appeal papers to U. S. C. C. A.; certificates of both Clerks.
Volume II. Pages 181 to 460	The testimony introduced and proceedings at the trial by the respondent, Kimball Laundry Co., appellant in U. S. C. C. A.
Volume III. Pages 461 to 868	The testimony introduced and proceeding at the trial by the petitioner, United States of America, appellee in U. S. C. C. A.

The original typewritten record made by the official court reporter in the United States District Court consisted of four separate volumes of the proceedings at the trial. The original typewritten Volumes I (pp. 1-396) and III (pp. 1050-1097) contained the oral testimony and exhibits of the respondent, Kimball Laundry Company, the exhibits being separately bound by the court reporter in said Volume III. The original typewritten Volume II (pp. 397-915; 916-1009; 1010-1049D) and Volume IV (pp. 1098-1122) consisted of the oral testimony and exhibits of the petitioner, the United States of America, the exhibits being bound separately in said Volume IV. A separate typewritten index was compiled by the court reporter for these four typewritten volumes.

The transcript of the Clerk of the United States District Court consisted of 174 pages.

These four original typewritten volumes plus the transcript of the Clerk of the U. S. D. C. constitute the original records from the U. S. D. C. These originals have all been compiled into the aforementioned *three printed volumes* for the U. S. C. C. A.

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KIMBALL LAUNDRY CO. EXHIBITS—

All found in Folio Volume III, pp. 1050 to 1097

Exhibit No.		
1	Audits of K. L. Co. from 1/1/24 to 12/31/42 by C. L. Hillmer Co., C.P.A. dated 10/19/43	
	Identified	Vol. I, 10 188
	Offered	Vol. I, 11 189
	Refused	Vol. I, 13 190
	Found	Vol. III, 1050 190
2	Statement of K. L. Co. with list of real estate and equipment at 12/31/42 to C. L. Hillmer Co., C.P.A. dated 10/19/43	
	Identified	Vol. I, 13 192
	Offered	Vol. I, 13 192
	Refused	Vol. I, 18 194
	Found	Vol. III, 1051 198
3	Statement of income and funds depository of K. L. Co. for 5 yrs. 1/1/38 to 12/31/42 by C. L. Hillmer Co., dated 10/20/43	
	Identified	Vol. I, 21 196
	Offered	Vol. I, 22 196
	Refused	Vol. I, 24 198
	Found	Vol. III, 1052 200

		Original	Print Vol. II
4	Letter from Hillmer to Kimball Laundry Co., dated 10/21/43 with schedule showing its net profits for yrs. 1924 to 1942 inclusive		
	Identified	Vol. I, 25	201
	Offered	Vol. I, 26	202
	Refused	Vol. I, 27	202
	Found	Vol. III, 1053	203-4
5	Statement of C. L. Hillmer Co. re principal surplus items 1/1/33 to 12/31/42, and summary of K. L. Co.		
	Identified	Vol. I, 28	205
	Offered	Vol. I, 29	205
	Refused	Vol. I, 30	205
	Found	Vol. III, 1054	206
6	Letter from Hillmer to Kimball Laundry Co. dated 10/27/43, pp. 1-2. Attached thereto comparative bal. sheet, p. 3. Statement of 19-yr. average 1924 to 1942 relative to capital and surplus and percentages of earnings, p. 4. Capital stock issued 1933 to 1941—dividends and percentages, p. 5. Valuation of bldg., percent of repairs to bldg., 1924 to 1942 inc., p. 6. Cost of equipment each year and repair to equipment and machinery during year and percentage, p. 7.		
	Identified	Vol. I, 30	207
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	Found	Vol. III, 1055	212-18
6	Page 7 of Ex. 6 (rebuttal same ex.)		
	Identified	Vol. II, 998	Vol. III, 856
	Offered	Vol. II, 998	Vol. III, 856
	Refused	Vol. II, 999	Vol. III, 857
	Found	Vol. III, 1055	Vol. II, 218
7	Statement of C. L. Hillmer Co., dated 10/28/43. Gross income, all depts., 1924 to 1942, inc.		
	Identified	Vol. I, 39	219
	Offered	Vol. I, 40	219
	Refused	Vol. I, 43	221
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		Original	Print Vol. II
8	Not offered; duplicate of No. 4.		
9	Not offered		
10	Statement of Volume 1 on general bundle work		
	Identified	Vol. I, 58	229
	Offered	Vol. I, 59	230
	Received	Vol. I, 65	233
	Found	Vol. III, 1057	234
11	Statement of volume of family laundry service		
	Identified	Vol. I, 67	235
	Offered	Vol. I, 67	236
	Received	Vol. I, 68	236
	Found	Vol. III, 1058	236-7
12	Hotel accounts, Volume 1, 1938 to 11/21/42		
	Identified	Vol. I, 69	238
	Offered	Vol. I, 69	238
	Received with Ex. 10	Vol. I, 72	240
	Found	Vol. III, 1059	241-2
13	Commission account, Volume 1, 1936 to 11/21/42		
	Identified	Vol. I, 73	243
	Offered	Vol. I, 73	243
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14	Valuation of customers serviced by Kimball Laundry Co. during 1942 (Harry Judd), C.P.A.		
	Identified	Vol. I, 269	368
	Offered	Vol. I, 270	368
	Refused	Vol. I, 270	369
	Found	Vol. III, 1061	370
15	Estimated cost to reestablish routes of K. L. Co. and gross income and operating expense. First year, minimum number of employees required to begin operations—prepared by Harry Judd, C.P.A.		
	Identified	Vol. I, 271	370

		Original	Print Vol. II
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	Found	Vol. III, 1062	372-5
16	Same as Exhibit 15, for second year of operation.		
	Identified	Vol. I, 271	371
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17	Same as Exhibit 15, for third year of operation		
	Identified	Vol. I, 271	371
	Offered	Vol. I, 273	371
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	Found	Vol. III, 1064	380-3
18	Not offered		
19	John Latenser, architect, giving construction cost of K. L. Co. building as of 11/21/42, dated 10/29/43		
	Identified	Vol. I, 97½	261
	Offered	Vol. I, 97½	261
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20	Not offered		
21	Inventory of Machinery 1942 and time of trial		
	Identified	Vol. I, 80	247
	Offered	Vol. I, 96	257
	Received, except first column, and jury instructed to disregard first column		
	Found	Vol. III, 1066	258-60
21A	Tabulation (rebuttal) Ex. 21		
	Identified	Vol. II, 976	Vol. III, 842
	Offered	Vol. II, 976	Vol. III, 842
	Received	Vol. II, 976	Vol. III, 842
	Found	Vol. III, 1066	Vol. III, 842
22	Withdrawn and substituted by Ex. 22A		
	Identified	Vol. I, 168	308

	Original	Print Vol. II
Offered	Vol. I, 170	309
Withdrawn	Vol. I, 171	310
22A Photostatic copy of letter dated 1/11/46 to commanding officer, signed by E. F. Ketcham, Colonel warning to close down boilers		
Identified	Vol. I, 168	308
Offered	Vol. I, 170	309
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Found	Vol. III, 1067	310-11
23 A. L. Jacobberger, estimate of cost of items of power equipment to replace		
Identified	Vol. I, 109	269
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Found	Vol. III, 1068	272-3
24 Tabulation of different departments of Kimball Laundry Co.		
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Offered	Vol. I, 127	281
Received	Vol. I, 127	281
Found	Vol. III, 1069	282-3
25 Photograph of Kimball Laundry Co., south and east view—exterior		
Identified	Vol. I, 135	288
Offered	Vol. I, 135	288
Received	Vol. I, 137	290
Found	Vol. III, 1070	290
26 Photograph of Kimball Laundry Co., north and east view—exterior		
Identified	Vol. I, 135	288
Offered	Vol. I, 135	288
Received	Vol. I, 137	290
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27 Photograph of Kimball Laundry Co., south view—exterior		
Identified	Vol. I, 135	288

		Original	Print Vol. II
	Offered	Vol. I, 135	288
	Received	Vol. I, 137	290
	Found	Vol. III, 1072	290
28	Price list—laundry service prices		
	Identified	Vol. I, 147	295
	Offered	Vol. I, 148	296
	Received	Vol. I, 149	297
	Found	Vol. III, 1073	297
29	Price list—dry cleaning prices		
	Identified	Vol. I, 147	295
	Offered	Vol. I, 148	296
	Received	Vol. I, 149	297
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30	Photograph Kimball Laundry Co., top of fourth floor before fifth floor built		
	Identified	Vol. I, 287	391
	Offered	Vol. I, 287	391
	Received	Vol. I, 287	391
	Found	Vol. III, 1075	391
31	Photograph of electric power control, as well as panel control for individual machines		
	Identified	Vol. I, 288	392
	Offered	Vol. I, 289	392
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32	Photograph—withdrawn.		
33	Photograph of ironers (part of second floor)		
	Identified	Vol. I, 289	393
	Offered	Vol. I, 294	395
	Received	Vol. I, 294	395
	Found	Vol. III, 1077	395
34	Photograph of part of third floor		
	Identified	Vol. I, 289	393

		Original	Print Vol. II
	Offered	Vol. I, 294	395
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	Found	Vol. III, 1078	395
35	Photograph showing shirt unit		
	Identified	Vol. I, 289	393
	Offered	Vol. I, 294	395
	Received	Vol. I, 294	395
	Found	Vol. III, 1079	395
36	Photograph—withdrawn		
37	Photograph showing another unit of pressing operations		
	Identified	Vol. I, 289	393
	Offered	Vol. I, 294	395
	Received	Vol. I, 294	395
	Found	Vol. III, 1080	395
38	Photograph showing part of extracting		
	Identified	Vol. I, 289	393
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	Found	Vol. III, 1081	396
39	Photograph of extractors and part of wash room on second floor		
	Identified	Vol. I, 290	393
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40	Photographs showing shirt operations		
	Identified	Vol. I, 290	393
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41	Letter from National Roofing Co. to Kimball Laundry Co., 3/4/46 giving cost of replacement		
	Identified	Vol. I, 316	408

		Original	Print Vol. II
	Offered	Vol. I, 317	408-9
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42	Letter from Isard Painting & Decorating Co. to Kimball Laundry Co., 3/6/46 on costs		
	Identified	Vol. I, 316	408
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43	Letter from Patterson-Kelley Co. to Kimball Laundry Co., dated 2/28/46, reheater, estimate of cost of equipment		
	Identified	Vol. I, 316	408
	Offered	Vol. I, 317	408
	Received	Vol. I, 323	412
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44	Letter from Patterson-Kelley Co. to Kimball Laundry Co., dated 2/28/46, re cost of storage tank		
	Identified	Vol. I, 316	408
	Offered	Vol. I, 317	408
	Received	Vol. I, 323	412
	Found	Vol. III, 1087	417

Kimball Laundry exhibits offered in rebuttal testimony:

45	List of items of machinery and parts moved away from Omaha QM Laundry to warehouse at Ft. Omaha		
	Identified	Vol. II, 735	Vol. III, 683
	Offered	Vol. II, 736	Vol. III, 684
	Received	Vol. II, 736	Vol. III, 684
	Found	Vol. III, 1088	Vol. III, 684-7
46	Not offered		
47	Not offered		
48	Summary and tabulation of Peter Dahlquist, an expert showing cost to repair machinery		
	Identified	Vol. II, 951	Vol. III, 822

		Original	Print Vol. II
	Offered	Vol. II, 952	Vol. III, 822
	Received	Vol. II, 952	Vol. III, 822
	Found	Vol. III, 1089	Vol. III, 822-3
49	Summary and tabulation of Peter Dahlquist, an expert, showing cost of repair		
	Identified	Vol. II, 952	Vol. III, 822
	Offered	Vol. II, 952	Vol. III, 822
	Received	Vol. II, 952	Vol. III, 822
	Found	Vol. III, 1090	Vol. III, 822-3
50	Summary and tabulation of Peter Dahlquist, an expert showing cost to repair machinery		
	Identified	Vol. II, 952	Vol. III, 822
	Offered	Vol. II, 952	Vol. III, 822
	Received	Vol. II, 952	Vol. III, 822
	Found	Vol. III, 1091	Vol. III, 822
51	Copy of letter from Steinheimer, contractor, to Rorick, to rebut govt. witness Rorick's estimate of painting		
	Identified	Vol. II, 956	Vol. III, 825
	Offered	Vol. II, 956	Vol. III, 825
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	Found	Vol. III, 1092	Vol. III, 826
52	Bid of Steinheimer to Rorick Construction Co., showing actual cost of painting		
	Identified	Vol. II, 960	Vol. III, 827
	Offered	Vol. II, 961	Vol. III, 828
	Refused	Vol. II, 962	Vol. III, 829
	Found	Vol. III, 1093	Vol. III, 829
53	Estimate of Peter Kiewit to repair and replace destroyed parts of building and fixed equipment		
	Identified	Vol. II, 967	Vol. III, 832
	Offered	Vol. II, 967	Vol. III, 833
	Refused	Vol. II, 970	Vol. III, 835
	Found	Vol. III, 1094	Vol. III, 835-8
54	Itemized list of A. L. Jacobberger and total showing items included in Kimball Laundry Ex. 21 that should have been excluded. Correction.		

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55 Letter from J. J. Hanighen Co., showing cost of boilers		
Identified	Vol. II, 983	Vol. III, 846
Offered	Vol. II, 984	Vol. III, 847
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56 Compilation of figures of A. L. Jacobberger to show capacity in poundage of K. L. Co.		
Identified	Vol. II, 1006	Vol. III, 861
Offered	Vol. II, 1008	Vol. III, 861
Received	Vol. II, 1008	Vol. III, 862
Found	Vol. III, 1097	Vol. III, 862
Instructions of the court given to the jury during trial of the case	Vol. I, 4	Vol. II, 185
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Instructions of the court given at the close of all testimony at submission	Vol. II, 1010	Vol. I, 150, 167
Exceptions of Kimball Laundry to Instructions of the court	Vol. II, 1036	Vol. I, 165
Exceptions of Government to Instructions of the court	Vol. II, 1039	Vol. I, 166
Requested Instructions of Government	Vol. II, 1042-A	Vol. I, 169
Requested Instructions of Kimball Laundry Co.	Vol. II, 1042-F	Vol. I, 172
Verdict of the jury	Vol. II, 1045	Vol. I, 95
		Vol. III, 863

TRANSCRIPT OF TESTIMONY

In the District Court of the United States
For the District of Nebraska
Omaha Division

UNITED STATES OF AMERICA, PETITIONER,

vs.

KIMBALL LAUNDRY COMPANY, A CORPORATION, ET AL., RESPONDENTS

No. 404 Civil

TRANSCRIPT

APPEARANCES:

MR. EMMET L. MURPHY, *Special Attorney, Department of Justice;*

MR. CHARLES D. HITCH, *Special Attorney, Department of Justice;*

MR. ROBERT R. MACLEOD, *Department of Justice, Division of Lands,* Washington, D. C.,

Appeared for Petitioner.

MR. WILLIAM J. HOTZ, Omaha, Nebraska, and
MR. GORDON DIESING, Omaha, Nebraska,

Appeared for Respondents.

I, WILDA SOUTHARD WOODBURY, Official United States Court Reporter, District of Nebraska, do certify that this transcript and exhibits, consisting of Four Volumes as follows:

Volume I, Pages 1 to 396, inclusive, containing Testimony of Kimball Laundry Company's Witnesses;

Volume II, Pages 397 to 1049-D, inclusive, containing Testimony of Government's Witnesses, Rebuttal Testi-

mony, Instructions, Verdict of Jury, and Application for Order to Withdraw Funds from Registry of Court;

Volume III, Pages 1050 to 1097, inclusive, containing Kimball Laundry Company's Exhibits; and

Volume IV, Pages 1098 to 1122, inclusive, containing Government's Exhibits,

is a true and correct transcript of all of the proceedings had and testimony adduced, both oral and documentary, in the case entitled In The United States District Court for the District of Nebraska, Omaha Division—United States of America, Petitioner, vs. Kimball Laundry Company, a Corporation, et al., Respondents, No. 404 Civil, tried before the Honorable J. A. Donohoe, Judge Presiding, and a jury, on the 4th, 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th, 18th, 19th and 20th of March, 1946, and hearing on Application on August 8, 1946, as taken in shorthand and transcribed by me.

Dated this 13th day of August, 1946.

(Signed) WILDA SOUTHARD WOODBURY,

Official U. S. Court Reporter

[fol. 1] March 4, 1946

The Court: I think before proceeding further we should dispose of the motions that have been heretofore submitted and argued. First, there is the motion to tax costs against the government and that motion will be overruled. The second motion was a motion to strike from the files petition in error and transcript of evidence before the board of appraisers. Motion sustained. Third, there was submitted the motion to strike from the so-called answer, certain allegations of evidence rather than of fact, and certain conclusions of law. I have checked them all over carefully and I think the motion is well taken and that motion will be sustained. In this case I do not know that the pleadings are necessary. As a matter of fact, I do not think they are unless ordered by the court and I am not certain whether or not there has been an application made by either side to have pleadings filed. However, this case being a trial de novo, the owner of the property becomes the plaintiff and the government becomes the defendant, and I take it, Mr. Hotz, that the allegations of your petition, if you desire the pleadings, are probably sufficient for your purpose. However, in view of this ruling, you may proceed during luncheon hour to check over your petition, because there will be a petition, and I will help you at the convening if it is [fol. 2] satisfactory for this purpose. Exception, of course, will be allowed.

Is there anything more before we proceed to impanel the jury?

Mr. Hotz: If Your Honor please, on behalf of the respondent, Kimball Laundry Company, we desire to read into the record a typewritten pleading that I have called a motion.

The Court: Leave it with the reporter and she will copy it in the record.

Mr. Hotz: I have served a copy on the other side. It pertains principally to opening and closing.

Mr. Murphy: Are you going to present that motion?

The Court: I do not think I need any argument on it. There is no rule or practice where a judge, upon the com-

mencement of the case, is asked to pass upon the questions of law which have not arisen and may not arise. Any question of law must arise from the evidence, and when we hear the evidence we will know what is involved, so the motion will be stricken, and exception allowed. Of course, you can present your motion and take your action at the appropriate time, Mr. Hotz, when legal questions are presented and passed upon.

(Copy of motion above referred to on next page)

[fol. 3] MOTION OF K. L. CO.

Comes now counsel for Kimball Laundry Company and states for the record:

That the Respondent, who is in effect the defendant, moves the Court to follow the State of Nebraska practice and procedure as nearly as may be in this condemnation case (40 USC 258a).

Respondent requests the application of the State Constitution as nearly as may be.

The Federal Rules of Civil Procedure specifically exempt their application in condemnation proceedings Rule 81 (a) (7).

The Federal Rules provide that the law of the state shall include its statutes and decisions. Rule 81 (3) (7).

The burden of proof in condemnation proceedings is upon the Respondent, Kimball Laundry Company. Consequently, the privilege of opening and closing should be granted Respondent. Request is so made.

The governing statute of Nebraska is R. S. N. 1943 (Sec. 25-1107). The decisions in point hold no discretion is lodged in the Court to change this statute.

Olson v. Hansen, 122 Neb. 492, 240 N. W. 551.

Sheibley v. Fales, 81 Neb. 795, 116 N. W. 1035.

Brumback v. American Bank, 53 Neb. 714, 74 N. W. 264.

U. S. v. 60,000 Sq. Ft. of Land (USDC Calif., 12/30/43), 53 F. Supp. 767, 771. J. Goodman, in a case where hotel was condemned for "temporary use," held:

[fol. 4] "Defendant having burden, will open and close the evidence and the argument."

Baetje v. U. S., 143 F. 2d 391 (1 Cir., 1944).

U. S. v. Prettyman, 142 F. 2d 891 (4 Cir., 1944).
U. S. v. Lands in Texas, 49 F. Supp. (1943).

The State Constitution is presented to this Court for application at this trial. It reads:

Article I, Section 21—"The property of no person shall be taken or damaged for public use without just compensation therefor." (RSN 1943, Vol. I, p. 62.)

Dated March 4, 1946. (Signed) William J. Hotz,
Hotz & Hotz,
Attorneys for Kimball Laundry Company

The Court: Is that all now, gentlemen?

Mr. Murphy: I believe so, Your Honor.

(Jury impaneled)

The Court: Due to the nature of the case and probable length of time it will take to try this case, it is therefore ordered that two alternate jurors now be impaneled. I will instruct you who are in the jury box. You are now selected as the jury to try this case. This is a very important case to all parties concerned. It involves a lot of property and it warrants and must have your very careful consideration. You have taken a solemn oath now that you will well and truly try this case, and to well and truly try the case, you must hear the evidence—you must know what it is about, you must understand it. [fol. 5] The only evidence you will consider are the documents, papers and exhibits that will be permitted in evidence by order of the Court, or from the testimony of the witnesses who may be called here on the witness stand. You are not to try this case from anything you might hear or might be said in your presence by anyone. You must consider what takes place here in the court room. You are the jury. You are all powerful. The case is now in your hands. The Judge on the bench is here in the nature of an umpire or referee so far as the taking of evidence is concerned. I am here to help you. I am here to see to it that you hear what is being testified to. If you do not hear, raise your hand and call it to my attention and I will have the witness repeat or explain more in detail. The case involves a property here in Omaha. The date around which the testimony will

cluster is November 22, 1942. Many things may have happened out there. Many changes may have taken place. We do not know. We do not want to know. For that reason, you are especially instructed that you must not think of going out and inspecting the property, or anything of that kind. That is not permissible. Some jurors feel that if they could just get to see what the witnesses are talking about they would understand it. That might [fol. 6] be true if the property were the same now as it was at the time it was taken, so you must not go near the building. You must hear the testimony here in the courtroom concerning the property, what it consisted of. It is very important, because if you violate this instruction, it would probably work a mistrial in the case, and we do not want that. We want to try this case in an orderly way. You are officers now of the United States Court, the highest officers now present. You must perform your duty and perform it well, as worthy citizens. Other men have added luster to this court and the confidence of the people in the court because they performed their duty without fear or failure. We expect that of you now, so that when you are all gone, nothing that may now transpire will lessen that respect and confidence of the people in this great institution.

(Opening statement by Mr. Hotz) (Not printed.)

* * *

Mr. Murphy: Petitioner objects to counsel's discussion of trade routes or business as incompetent and immaterial and no part of the issue in this case.

The Court: I can not determine from his statement the purpose for which he makes the statement, unless it be that it is something that pertains to the laundry business, [fol. 7] rather than anything personal to the owners. What we have here is the fair market value of the use, and I take it, in order to establish that question it is proper for the owner to show anything pertaining to the property that was used, and that probably will include what was the fair market value of the property that was used as an element, with all the other evidence in the case establishing the fair value of the use of the prop-

erty. If we understand each other, let us keep within the rule and we will have no difficulty.

* * *

Mr. Murphy: Petitioner objects to ar. statement of counsel as to the value of the laundry truck routes or the value, or supposed value of the business or good will as incompetent and immaterial and not within the issues in this case, and not within anything taken by the government in this action.

The Court: I think that is true. Let us keep away from the question until we can meet it squarely on the evidence you offer. Let's confine your opening statement to matters that will not be in dispute until you get to them.

* * *

Mr. Hotz: * * * The Jacobbergers were very proud that they had built up a plant that the United States—

[fol. 8] Mr. Murphy: I again object to this as argument and not statement.

The Court: This is an opening statement. Save that for your closing argument.

(Opening statement by Mr. Murphy). (Not printed.)

Mr. C. L. Hillmer, produced as a witness on behalf of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name, please? A. C. L. Hillmer.

Q. What is your business?

A. Certified Public Accountant.

Q. Where do you reside? A. Omaha.

Q. How long have you lived here?

A. About th' 'y years.

Q. Where is your office?

A. Omaha National Bank Building, No. 516.

Q. Please state whether or not you hold yourself out as a certified public accountant performing services for different people and corporations, and so forth, that demand your services? A. Yes, sir.

[fol. 9] Q. How long have you been doing that?

A. About twenty-six years.

Q. Here in the City of Omaha? A. Yes, sir.

Q. Are you acquainted with the Kimball Laundry Company? A. Yes, sir.

Q. Have you done certified public accounting work for that organization? A. Yes, sir.

Q. For how long? A. Since about 1924, I think.

Q. Have you continuously done their auditing work since that time? A. Yes, sir.

Q. Personally? A. Yes, sir.

Q. Do you remember when the Kimball Laundry building was built? I don't mean the time, but do you remember it? A. Yes, I do.

Q. Have you been their certified public accountant since the time they were established in their present location? A. Yes, sir.

Q. And at all times since?

[fol. 10] A. Yes, sir.

Q. What does your work consist of when you audit their books?

A. The verification of their assets and liabilities, of their income, and the expenses deductible from those incomes, and rendering a report to them to the effect that the figures are correct, and this report bears the certificate of correctness.

Q. And you handle their income tax matters?

A. Yes, sir.

Q. During all this period of time? A. Yes, sir.

Q. There are here in the courtroom a number of books. Have you examined these books here? A. Yes, sir.

Q. Are these the books of the Kimball Laundry Company? Yes, sir.

Q. Are these the books from whence your audits have been made? A. Yes, sir.

Q. Calling your attention to an exhibit which we have had marked Defendant's Exhibit 1, subject to the change in parties, I will ask you to state what that is?

A. This is a statement which shows the cash accounts, [fol. 11] securities, and so forth, on January 1, 1924, and it shows these same assets as of December 31, 1942.

Beginning with the cash accounts, securities, and so forth, on January 1, 1924, we add the gross income from operations of the laundry, other income from investments, discounts, and so forth, and then additional contribution to capital, and from that are deducted all expenditures made during this period, to leave a balance as of December 31, 1942.

Mr. Hotz: That was very shortly after the taking.

Q. What portion of the year 1942 does that report take in?

A. The operations ended on November 22, I think, 1942. There are some small items of expense carried on to the end of the year, so I added in my report December 31, 1942.

Q. As I understand that exhibit, it shows the operations of that company to income and expenditures, on one sheet, from January 1, 1924, to December 31, 1942, is that right? A. It covers receipts and disbursements.

Q. Was that made by you? A. Yes, sir.

Mr. Hotz: We offer in evidence this exhibit.

Mr. Murphy: To which petitioner objects as incom-
[fol. 12] petent and immaterial and not tending to prove any issue in this case, and to a large extent being too remote under any possible theory of competency.

The Court: You are not objecting to the qualification of the witness?

Mr. Murphy: No, Your Honor. Did you see what it is?

The Court: Yes, it is a statement of receipts and disbursements just prior to the taking of the property.

Mr. Murphy: Covering the entire twenty-year period.

The Court: Your objections are pretty indefinite. I think perhaps some of it is pretty remote, but in the more recent years it is competent.

Mr. Murphy: The exhibit itself does not segregate the matter as to years, but simply lumps the entire twenty-year period so that necessarily every figure on there covers the entire twenty-year period. It is objected to as entirely too remote.

The Court: That objection will be good. You will have

to separate the years so that we can determine which is remote and which is not.

Mr. Hotz: In the exhibits that we have that are following we do that by the growth of the business and (fol. 134) the productivity.

The Court: Let us get the foundation. We will do the figuring afterwards. Objection will be sustained.

Kimball Laundry Exhibit 1, found in Vol III, at page 1050.

[fol. 1050] D. EX. 1 (Refused)

C. L. HILMER COMPANY

Accountants and Auditors

516 Omaha National Bank Building Omaha, Nebraska
Phone HA 7016

C. L. Hillmer, C. P. A. L. A. Nelson, C. P. A.

October 19, 1943

Kimball Laundry Company,
Omaha, Nebraska

Gentlemen:

Herewith find a statement of funds provided from January 1, 1924 to December 31, 1942 and the disposition of these funds. This statement was compiled from certified audit reports of your Company for the years covered by this statement.

FUNDS PROVIDED:

1.	Cash accounts receivable, securities and supplies on hand January 1, 1924	$ 58,266.57
2.	Gross income from laundry operations	6,728,454.64
3.	Income from investments, discounts, etc.	72,075.72
4.	Proceeds from sales of capital stock in 1924	100,000.00
5.		6,958,796.93

DISPOSITION OF FUNDS:

6.	Officers salaries	$ 393,242.69
7.	Repairs to building	35,144.35
8.	Repairs to laundry equipment	115,849.45
9.	Advertising and publicity	148,910.01
10.	Real estate and personal taxes	93,100.16
11.	Interest paid	42,128.83
12.	Income taxes	54,980.50
13.	Wages, supplies, delivery and other expenses not otherwise classified	5,070,919.59
14.	Losses sustained from equipment abandoned, sold or exchanged	101,313.61
15.	Additional cost of real estate ($48,152.00 paid previously)	5,037.50
16.	Cost of building	205,035.12
17.	Cost of new machinery—$4,955.89 previously purchased	400,338.92
18.	Cost of new office equipment—$1,068.50 previously purchased	8,895.88
19.	Cost of delivery cars	9,881.96
20.	Dividends paid	147,900.00
21.		6,832,678.87
22.	Cash, accounts receivable, securities and supplies on hand December 31, 1942	$ 126,118.06

Yours very truly,

C. L. HILMER COMPANY

C. L. HILLMER

Certified Public Accountant

Q. Calling your attention to Defendant's Exhibit 2, I will ask you to state what that is?

A. This is a short history of the company with a list of real estate and equipment at December 31, 1942, included.

Q. It shows, does it not, the total investment in real estate, building, equipment, and the other items shown on there, up to December 31, 1942, does it not? A. Yes.

Q. And shows all of it as a sum total? A. Yes, sir.

Mr. Hotz: We offer Exhibit 2 in evidence.

The Court: When was the extra story put on the building? What time?

Mr. Hotz: 1935.

The Court: The building was then completed to the size and extent that it now is?

Mr. Hotz: Yes.

[fol. 14] The Court: And when was this machinery put in?

Mr. Hotz: That was added from time to time throughout the entire period, substituting new machinery and one thing and another.

The Court: Do you have a report of the machinery on hand prior to 1935?

Mr. Hotz: Yes.

The Court: Can't you segregate it so that we can make the record and have no question about it?

Mr. Hotz: This shows the total cost of the installations as of the time of the taking. It is brought down to that date. It is brought down to the date of December 31st. It shows their books and investment.

The Court: Start at December 31st and go back.

Mr. Hotz: It shows their investment.

The Court: Go ahead.

Mr. Murphy: Petitioner objects to Defendant's Exhibit 2 generally as being incompetent and immaterial and no proper and sufficient foundation laid, and objects specifically to Paragraph One of the exhibit as being a mere conclusion and too remote. We object specifically to subentry 9 under paragraph 2 as covering some matters not involved in this litigation at all—some automobiles. We

[fol. 15] specifically object to paragraph 2 as no foundation laid, the matter set out here being mere book values; the witness not shown qualified and not having adduced any evidence as to market value or value as a basis to determine value in a condemnation case. Specifically we object to paragraphs 3, 4, 5, 6 and 7 as containing matters in each of said paragraphs too remote and which can not be segregated from the other portions of the paragraphs, and particularly, I am concerned with the figures set out here, that there is no foundation laid. They are mere book values and not any proof of value.

Q. Are these book values or costs? A. Costs.

Q. Taken from the books and records to show their total investment in real estate, total investment in building, total investment in laundry equipment, feather cleaning equipment, dry cleaning equipment, cold storage equipment, power equipment, office equipment, and automobile equipment, is that right? A. Yes.

Q. And those are the costs that this Kimball Laundry Company had invested in those items up to December 31, 1942, is that right?

[fol. 16] A. Yes, sir.

Q. And taken from the books and records of the company as a cost item? A. Yes, sir.

The Court: May I see the exhibit?

Mr. Murphy: So the Court gets the position clear, specifically I have in mind that cost, and particularly costs twenty years ago, is no proper element of value in 1942, and the matters in the exhibit pertaining to business income are incompetent generally on the ground stated above, as business income, particularly in remote years and unsegregated, is no basis for proof of value in 1942.

Mr. Hotz: This is the cost as shown on the books and records of this company in 1942, when this land was taken and that is one of the elements that is necessary to arrive at and determine what you are going to ultimately have. Elements of cost and productiveness are always competent in any lawsuit for damages in connection with property. It doesn't make any difference when the cost was put in. That is a matter of something else.

The Court: The Court has the view that the question here is the real market value of the property at the time it was taken, as a means of arriving at a fair rental [fol. 17] value, which is the function we are now undertaking. The cost of property is always an element in determining what the value is, but as time goes on it becomes so uncertain as to be of no particular value. I see that the statements as they are prepared are not going to serve the function that you are undertaking. You have the books here and you have to refer to the books. This kind of a statement, and this kind of an accounting is not going to help us. You may take the different years. You can prove what the values were, the company as a going concern; that is, if that will be received as touching upon the value of the property when the Government took it. You can start in 1942 and go back, as you wish, and take the different items as they are represented, and consider what they are, and understand more about what we are doing.

Mr. Hotz: In order not to waste any time, I want the privilege, when I finish with the rest of these exhibits on this same line in bringing them up to date, to make my offer of proof with this witness.

The Court: You always have that privilege. We are not denying anyone the right to be heard. Let us proceed in the proper way.

Mr. Hotz: Do I understand the court's objection is because that is not the best evidence? The books are?

[fol. 18] The Court: The Court is not making the objection.

Mr. Hotz: The Court is ruling on the objection.

The Court: The Court is ruling that the exhibit in its present form and with the present foundation is not entitled to be received.

Q. Mr. Hillmer, do the books and records of the corporation reflect in any place, for example, the real estate that was purchased in 1924, was it not?

A. I just don't remember the date. It was on the books.

Q. It was purchased then and there were no other purchases of real estate? A. I believe that is correct.

Q. In connection with the building, the building was built—

The Court: Let us find what the real estate cost.

Mr. Hotz: It is on this exhibit. It is $53,189.50.

The Court: You have a lot of other things on the exhibit that should not be there.

Q. Does this Exhibit 2, which we have—

The Court: Wait a minute.

Mr. Murphy: I move to strike the statement of counsel reciting the figure, as incompetent.

The Court: It will be sustained. It will be stricken.

[fol. 19] Mr. Hotz: Going back again to Exhibit No. 2, not trying to get the Court to change his ruling that he made in connection with it, but I would like to see the exhibit more fully explained.

Q. The building was built when? A. 1942.

Q. I mean the building—when it was built?

A. 1922 or 1923.

Q. And then when it was completed this Exhibit No. 2 shows the amount of money that they had invested in the building? A. Yes, sir.

Q. And in Item No. 3 is shown laundry equipment and machinery, is that right? A. Yes, sir.

Q. Where does that item shown on the exhibit come from?

A. From the ledger and from their books, based on cash expenditures. It is part of our accounting system there, their assets.

Q. The same is true with the dry cleaning equipment? When was that purchased?

A. At various times. We have a complete schedule showing each year in which each one of those items were [fol. 20] purchased or sold and shows what the remaining value is and what was purchased.

Q. Is that available? A. It is over at our office.

Q. You have that? A. Yes, sir.

Q. Can you get it? A. Right now?

Q. I will see first. In other words, the total amount of cash invested in dry cleaning equipment by that company is shown on this Exhibit No. 2, also, is it not?

A. That is right.

Q. And that is true with the power equipment?

A. Yes, sir.

Q. And that is true with the office equipment?

A. Yes, sir.

Q. And that is true with the automobile equipment?

A. Yes, sir.

Q. And the item of a pump? A. Yes, sir.

Q. And that went to make up the actual cost of those ten items as shown by the books of this corporation?

A. Yes, sir.

Q. You say you have all of those items for the years [fol. 21] in which they were made, is that right?

A. Each year's purchases are segregated, not by items, but by amounts taken in each year, each department.

Q. Expenditures? A. Yes, sir

Q. In what form is that document?

A. Those are what we call our depreciation schedules on big work sheets showing each year's depreciation and each year's addition and totals.

Q. You have that all available? A. Yes, sir.

Q. I have an exhibit here, Exhibit No. 3, and I will ask you to state what that exhibit is.

A. This is the cash and securities, accounts receivable and supplies, January 1, 1938, and also December 31, 1942, and also shows the gross income from laundry operations and also from investments and discounts, and from that are deducted the expenditures for salaries, expenses, equipment, improvements, and so forth.

Q. That is for the period of 1938 to 1942, inclusive?

A. Yes.

Q. A shorter period? A. Yes, sir.

Q. Is that right?

[fol. 22] A. Yes, sir, five years.

Q. And this was made by yourself? A. Yes, sir.

Q. Made from the books and records that are here in court, is that right? A. Yes, sir.

Q. For the period shown on this Exhibit 3?

A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit No. 3.

Mr. Murphy: Petitioner objects to Exhibit 3 as incompetent and immaterial; no proper and sufficient foundation laid; containing items too remote in time and which can not be segregated; and further and specifically for the reason that the figures and items on Exhibit 3 have to do with the business investments, even including securities and other matters and in no manner pertaining to the value of the property taken.

The Court: The item contains other items other than the cost of the material that was purchased during that time? A. Yes, sir.

The Court: And it also includes, I notice, cash, accounts receivable, securities, and it shows gross income from laundry operations. That covered the four years, did it?

fol. 23] A. Yes, sir.

The Court: It shows officers' salaries, repairs to building and equipment, advertising and publicity, income taxes paid, wages, supplies delivered and other expenses not otherwise classified, purchase of equipment. That was new equipment that was purchased during that time, was it? A. Yes.

The Court: Purchase of office equipment. What does that consist of? A. During that period.

The Court: And that consists of what, supplies or furniture?

A. Desks and typewriters and adding machines and things used in the office.

The Court: Things that were in general use from day to day in the ordinary expense of running an office?

A. Yes, sir.

The Court: And you have dividends? A. Yes, sir.

The Court: In your auditing you made a computation of the cost of the real estate and the date when it was purchased, starting back with 1922?

fol. 24] A. That was taken from checks issued.

The Court: Have you a record of that?

A. Just exactly what is included in the cost of that real estate.

The Court: I am asking you if you prepared a state-

The Court: Not from year to year?

Mr. Hotz: No, this was the sum total, and that is here itemized year by year.

The Court: Let us proceed, Mr. Hotz. The objection will be sustained except as to the next to the last page, which will be received.

Mr. Hotz: I offered the whole exhibit and not the one page, because the exhibit is a composite exhibit. It is a comparative balance sheet and unless it is offered with the balance of the exhibit it is almost unintelligible. I offer the exhibit in its entirety, Exhibit 6.

The Court: It is the ruling of the Court that all of the exhibit is incompetent and not material to the issue, except the second to the last page, which may be received, if counsel so elects.

Kimball Laundry Company Exhibit No. 6 appearing in Vol. III, at page 1055.

[fol. 1055-1] D. EX. 6 pp. 1-7 (p. 6 Received)
(pp. 1 to 5 and 7 Refused)

Kimball Laundry Company.
Omaha, Nebraska October 27, 1943
Gentlemen:

Attached hereto are the following statements which were made in compliance with your request:

Comparative balance sheet at December 31, 1923, and December 31, 1942.

Percentage of officers' salaries to capital stock issued and to total investment, years 1924 to 1942, inclusive.

Percentage of dividends to capital stock issued and to total investment, years 1924 to 1942, inclusive.

Percentage of repairs to building cost, years 1924 to 1942, inclusive.

Percentage of repairs to equipment to equipment costs, years 1924 to 1942, inclusive.

With respect to obsolescence and replacements, the average annual investment in laundry machinery for the nineteen years from 1924 to 1942, inclusive, is $266,587.58. The cost of the equipment replaced or sold is $30,350.63 for the nineteen years, or an average of $1,597.40. This would

make the percentage of obsolescence 11.38%, or an annual average of .6%. Similar figures show the percentage of power equipment replacement and obsolescence to be an annual average of .3-½% for the nineteen years.

Dry cleaning equipment was installed since 1932 and the cold storage and feather equipment since 1937 and no replacements of consequence have been made.

The figure of $101,313.61 shown on our previous report for the total losses from equipment abandoned, sold or exchanged is not the cost of this equipment, but the cost less the trade-in or salvage value.

[Fol 1053-2] - 2 -

The figures of $30,350.63 and $1,845.17 for replacements of laundry equipment and power equipment, respectively, are the cost of these items traded or sold. These amounts do not include the equipment on hand in 1924 which was abandoned when the new plant was equipped but are replacements.

The $101,313.61, therefore, includes the $30,350.63 and the $1,845.17 less trade-in or salvage value, the $25,299.20 abandoned in 1924 and 1925 and also automobiles both less trade-in and salvage values.

The records are not readily available and it would not be practical to attempt to make an exact analysis of the $101,313.61 as automobiles were traded almost each year. However, the amounts of sales and replacements of laundry machinery and power machinery are substantially correct and are stated at cost.

Yours very truly,

C. L. HILLMER COMPANY
C. L. HILLMER

Certified Public Accountant

ment showing when the property was acquired and what it cost, the day and the year? A. Yes, sir.

The Court: Have you a statement showing when the equipment was purchased and what it cost from year to year? A. Yes, sir.

The Court: Do you have that statement with you?

A. No, sir.

The Court: How long would it take you to procure it?

A. Just go over to the office and get it.

The Court: These statements include so many other items as to confuse the issue. You have the books here and if he has these statements separately, we will be glad to have them and examine them. It will probably save time by doing that. Otherwise, you have book values and date and amount that was paid and when you get the evidence, we will determine whether of not it is of evi- [fol. 25] dential value, or whether it is too remote, or whether it is within the time of reason.

Kimball Laundry Exhibit 2, found in Vol. III, at page 1051:

[fol. 1051-1] D. EX. 2 (Refused)

Kimball Laundry Company, October 19, 1943
Omaha, Nebraska.

Gentlemen:

1. We have made an analysis of the certified audit reports of the Kimball Laundry Company for the years 1924 to 1942 inclusive and submit the following figures which report the Company's history, its operations and the cost and classification of its fixed assets for that period.

2. The Kimball Laundry Company was incorporated in 1910, and in 1924 a new building was built and equipped for their purpose at Fifteenth and Jones Streets in Omaha. Equipment was replaced at various times as more efficient machines came on the market from time to time. All equipment which had been replaced or sold has been taken off the books and the list herewith contains only such fixed assets as were on hand at December 31, 1942, stated at cost.

1.	Real estate	$ 53,189.50
2.	Building	205,035.12
3.	Equipment - Laundry	311,632.06
4.	Equipment - Feather	2,793.54
5.	Equipment - Dry Cleaning	59,049.75
6.	Equipment - Cold Storage	4,721.10
7.	Equipment—Power	27,098.36
8.	Office equipment	9,964.38
9.	Automobiles (15)	9,561.80
10.	Pump	320.16
		$683,365.77

3. No change has taken place in the book values of these fixed assets between November 21, 1942, and December 31st, 1942. From January 1, 1924 to December 31, 1942, the Company spent $35,144.35 in repairs and improvements on the building, and $115,849.55 in upkeep of the equipment. These items were charged to expense [fol. 1051-2] and are not included in the $683,365.77 cost of the plant above.

4. On January 1, 1925 the company's books showed a surplus of $9,667.48, and on December 31, 1942 the surplus was $195,336.61. This is an increase of $185,669.13 in 18 years. In addition dividends of $147,900.00 were paid to the stockholders and the total earnings in the 18 years were $333,569.13. The total includes about $50,000.00 of income from investment of surplus funds kept for emergencies. This leaves an average of about $15,000.00 per year from laundry operations.

5. The corporation stock is closely held by the Jacobberger family. During this period of 18 years the officers drew about $375,000.00 as administrative salaries. This is an average of almost $21,000.00 per year. In 1941 these salaries were $27,400.00, and for the year 1942 were $22,550.00.

6. In 1924 the gross business of the company was $306,244.76. It fell to $274,913.90 in 1933, was built to $380,599.35 in 1941, and in 1942 (to November 21st) the

gross business was $360,617.90. At this rate it would have been over $400,000.00 for the year 1942 if it had continued to December 31st. During the period from 1924 to 1942 inclusive the company spent $148,910.01 in advertising and $5,119.50 in contributions to charitable and business organizations. These items which were a factor in getting the increased business have been charged to expense and have not been capitalized as Good Will.

7. Depreciation of building and equipment is set up on the books at rates allowed by the Treasury Department for income tax deductions. In 1929, 1934 and 1939 adjustments to the depreciation reserve of over $50,000.00 were made because the Revenue Agents considered the rates excessive.

Yours very truly,
C. L. HILLMER COMPANY
C. L. HILLMER
Certified Public Accountant

Kimball Laundry Exhibit 3, found in Vol. III, at page 1052:

[fol. 1052] D. EX. 3 (Refused)

Kimball Laundry Company, October 20, 1943
Omaha, Nebraska

Gentlemen:

We herewith present a statement of funds provided and the disposition of these funds for the five years from January 1, 1938 to December 31, 1942.

The net profit for these five years after deducting $112,676.84 in officers salaries, $10,995.63 in repairs to the building, $29,531.14 in repairs to equipment, $42,833.93 in advertising and publicity and $121,079.27 in depreciation, was $65,555.88. The average per year from laundry operations before deducting income tax and depreciation is about $32,000.00 per year and officers' salaries average over $22,500.00 per year. The stock of the company is closely held by the Jacobberger family and the officers are all members of this family.

The figures in this statement were taken from annual certified audit reports of the company's business.

FUNDS PROVIDED:			
1.	Cash, accounts receivable, securities and supplies—January 1, 1938		$ 121,798.62
2.	Gross income from laundry operations		1,775,076.61
3.	Income from investments, discounts, etc.		40,413.27
4.			1,937,288.50
DISPOSITION OF FUNDS:			
5.	Officers salaries	$ 112,676.84	
6.	Repairs to building	10,995.63	
7.	Repairs to equipment	29,531.14	
8.	Advertising and publicity	42,833.93	
9.	Real estate and personal taxes	25,894.73	
10.	Income taxes paid	12,073.24	
11.	Wages, supplies, delivery and other expenses not otherwise classified	1,405,658.80	
12.	Purchases of equipment	30,940.18	
13.	Purchases of office equipment	1,636.05	
14.	Purchases of delivery cars	9,881.96	
15.	Dividends paid	97,900.00	
16.	Losses sustained from equipment sold or exchanged	28,187.94	
17.			1,808,170.44
18.	Cash, accounts receivable, securities and supplies December 31, 1942		$ 129,118.06

Yours very truly,
C. L. HILLMER COMPANY
C. L. HILLMER
Certified Public Accountant

Q. We will see about this one. Calling your attention to Exhibit 4, consisting of a letter from you and a list of figures from 1924 to November 21, 1942, I will ask you to state what that is and if you compiled it and from what records you compiled it?

A. This exhibit shows the profit from laundry operations and the net profit from all sources, the income tax paid, the depreciation taken, and the net profit after deducting depreciation and income tax. In other words, the increase in surplus for each year and also it contains an analysis of the surplus account condensed throughout that period.

The Court: What period?

A. From 1924 until 1942. These items in the schedule are all shown by years.

The Court: Can you segregate from that statement any income that they derive from investments and securities, or anything that is not directly attributable to the laundry [fol. 26] and the operation of laundry?

A. Yes, sir, the operations from the laundry are shown in the first column and the total operations, which include the laundry and so forth, are shown in the second column.

The Court: Column One shows the net profits?

A. Net profits before taking depreciation.

The Court: And then you show, do you, the depreciation that was taken? A. For each year.

The Court: That is all disclosed by the books of the company, is it? A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit 4.

Mr. Murphy: Petitioner objects to all of Exhibit 4, except only the list of figures in the next to the last column under the heading "Depreciation," for the reason that all other items on the exhibit are incompetent and immaterial and no proper and sufficient foundation laid, and specifically having to do with the business profits and the business income and outgo, and not the matter of the value of the property taken; and also as being too remote in time on a large portion of the exhibit, which is not segregated.

[fol. 27] The Court: Due to the fact that this exhibit contains items that I think it should not properly contain in its present form, I must exclude it, but if counsel will segregate in a separate statement the item showing the net earnings of this laundry from 1924 to 1942, until No-

vember 1942, and the other item of depreciation taken; I will receive it. I can not receive it with a lot of other items I think should not be in here.

Mr. Hotz: There were no other items excepting incident to the laundry business. They are comparatively in the second column—for example, you take the year 1924, the net profit from laundry operations before deducting depreciation and income tax, giving the date and certain figures; the net profit from all sources before deducting depreciation and income tax, is the same figure, and it goes on down. There are comparatively small items and interest and things of that sort that came from their surplus account. It does not amount, over a long period of years even, to a great deal. Column One shows their total net profit from laundry operations, shows the total of that up to November 21, 1942. Then it shows the income tax paid. Naturally that might be of interest to know what that is. It might have probative force to see [fol. 28] what that is. Then depreciation taken on income tax returns—that means on the whole plant—and net profits after deducting depreciation and income tax, but that second column hasn't any great significance, and if they had their surplus in the bank and got a little interest on it, that was shown properly as a matter of bookkeeping and accounting.

The Court: The Court has ruled.

Kimball Laundry Exhibit No. 4, found in Vol. III, at page 1053.

[fol. 1053-2] D. EX. 4, p. 2 (Refused)

Kimball Laundry Company, October 21, 1943
Omaha, Nebraska.

Gentlemen:

In compliance with your request we have made the attached schedule showing net profits for the years 1924 to 1942 inclusive.

The figures were taken from annual certified audit reports.

Yours very truly,
C. L. Hillmer Company
C. L. Hillmer
Certified Public Accountant

[fol. 1053-2] D. EX. 4, p. 2 (Refused)

October 21, 1943

KIMBALL LAUNDRY COMPANY

Analysis of Net Profit for Years 1924 to 1942 Inclusive

	Net Profit from Laundry Operations before Deducting Depreciation and Income Tax	Net Profit from All Sources before Deducting Depreciation and Income Tax	Income Tax Paid	Depreciation Taken on Income Tax Returns	Net Profit after Deducting Depreciation and Income Tax (Increase in Surplus)
1924	$ 7,293.66	$ 7,493.66		$ 13,198.33	$ 5,704.67
1925	23,981.55	23,981.55		27,769.68	3,788.13
1926	39,885.79	39,885.79	$ 1,601.75	27,593.07	10,690.97
1927	55,895.11	55,895.11	1,345.32	28,439.13	26,110.66
1928	66,069.49	66,069.49	4,852.43	29,930.39	31,286.67
1929	67,406.91	67,406.91	4,641.49	33,462.48	29,302.94
1930	78,466.57	78,662.17	8,556.08	36,201.70	33,904.39
1931	68,503.33	68,751.38	3,579.80	36,232.55	28,939.03
1932	44,591.98	46,236.56	1,242.52	38,063.49	6,930.55
1933	37,785.20	40,020.51	401.15	38,441.06	1,178.30
1934	40,868.68	43,978.54	3,293.41	22,399.71	18,285.42
1934			4,484.75	37,554.58b	33,069.83
1935	40,532.99	44,468.65	2,638.13	23,059.03	18,771.49
1936	34,923.55	38,653.06	1,777.82	24,442.53	12,432.71
1937	41,640.55	46,330.95	2,578.17	27,307.51	16,445.27
1938	31,675.52	40,356.55	883.52	28,749.49	10,723.54
1939	33,827.85	42,270.49	2,185.13	22,234.06	17,851.30
1939			862.31	16,032.69b	15,170.38
1940	26,594.76	31,618.56	1,238.06	22,985.03	7,395.47
1941	33,453.55	36,300.43	3,013.93	24,189.19	9,097.31
1942 to 11/21	26,938.05	36,089.12	3,890.29	22,921.50	9,277.33
	$800,335.09	$854,469.48	$53,066.06	$474,032.66	$327,370.76

Surplus per books January 1, 1924	$116,121.83
Less 1923 items paid after January 1, 1924	255.98
	115,865.85
Net Gain above	327,370.76
	443,236.61
Less Dividends	247,900.00
	$195,336.61

a - Indicates Losses

b - Depreciation disallowed by Revenue Agent

Q. Mr. Hillmer, calling your attention to Exhibit 5, I will ask you to state what that exhibit reflects? Was it made by you? A. Yes, sir.

Q. And from the books and records of the Kimball Laundry Company?

A. Yes, sir. This schedule shows in Column One the net profit from operations of the laundry before deducting depreciation and income tax, for the ten years beginning with 1933, and then shows officers' salaries, income tax, depreciation expense, the net addition to surplus. It just shows these figures for the ten years.

Q. From an accounting standpoint, explain what that [fol. 29] exhibit purports to show. Without giving the items, what is the deduction that can be made from that exhibit and its purpose, as you view it.

A. It was made to show the profits of the laundry before deducting the salaries of officers and income tax and depreciation, and these three items are shown separately and deducted, so that the final column shows the net increase in surplus.

The Court: That is the net earning during those years?

A. Yes, sir, after deducting income tax, depreciation, and officers' salaries.

The Court: After deducting all the expenses?

A. Yes, sir.

The Court: Does it include anything in the earning column other than money derived from the operation of the laundry?

A. Yes, sir, this also includes income from their investments. They had their surplus funds invested.

The Court: Can you segregate those items and separate it from the others?

Q. That could be done from the previous exhibit?

A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit 5.

Mr. Murphy: Objected to for the same reasons as to [fol. 30] Exhibit 4, and ask that the reporter be permitted to extend the objection instead of repeating it at this time.

The Court: That will be sustained. Prepare a statement. I will not permit anything to go to the jury except what I think is competent to be received.

Kimball Laundry Exhibit No. 5, found in Vol. III at page 1054.

[fol. 1054] D. EX. 5 (Refused)

KIMBALL LAUNDRY COMPANY

Principal Surplus Items January 1, 1933 to December 31, 1942

	Net Profit before deducting Depreciation Income Tax Officers' salaries	Officers' Salaries	Income Tax	Depreciation Expense	Net addition to Surplus from Operations
1933	$ 49,240.51	$ 9,220.00	$ 401.15	$ 38,441.06	$ 1,178.30
1934	62,167.19	18,188.65	3,293.41	22,399.71	18,285.42
1935	63,508.65	19,040.00	2,638.13	23,059.03	18,771.49
1936	58,333.06	19,680.00	1,777.82	24,442.53	12,432.71
1937	65,590.95	19,620.00	2,578.17	27,307.51	16,445.27
1938	60,576.55	20,220.00	883.52	28,749.49	10,723.54
1939	62,362.89	20,092.40	2,185.13	22,234.06	17,851.30
1940	54,033.00	22,414.44	1,238.06	22,985.03	7,395.47
1941	63,700.43	27,400.00	3,013.93	24,189.19	9,097.31
To Nov. 21st 1942	58,639.12	22,550.00	3,890.29	22,921.50	9,277.33
Totals—Ten-year period	$598,512.35	$198,425.49	$21,889.61	$256,729.11	$121,458.14

Summary

Surplus January 1, 1933		$173,538.26
Net amount from operations after deducting officers' salaries, income tax and depreciation	$121,458.14	
Depreciation restored to surplus	$53,587.27	
Less additional income tax assessed by this depreciation disallowance	5,347.06	
	48,240.21	
		$169,698.85
		343,236.61
Dividends from Jan. 1, 1933 to Dec. 31, 1942		147,900.00
Surplus December 31, 1942		$195,336.61

The above figures were compiled from copies of certified audit reports by us.

C. L. Hillmer Company

C. L. Hillmer

Certified Public Accountant

Q. Calling your attention to Exhibit No. 6, consisting of the first page and the second page and five additional pages, seven pages altogether, I will ask you to state what that is and if it was prepared by you and from what records you prepared it.

A. The first page shows the assets and liabilities of the company as of December 31, 1923, and also on December 31, 1942, and the increase or decrease in each item is shown on the statement. The second page shows for these years, 1924 to 1942, inclusive, the invested capital, capital and surplus, the officers' salaries, per cent of officers' salaries to capital stock, per cent of officers' salaries to capital stock and surplus. The next sheet shows capital stock issued, the total capital and surplus for the years 1933 to 1941, inclusive, the dividends paid, percentage of dividends to capital stock, and percentage [fol. 31] of dividends to total investment, that is, capital and surplus. The next page shows for that period, by years, the valuation of the building; that is, the cost of the building at the end of each year, and the repairs each year.

The Court: What page are you referring to?

Mr. Hotz: Page 6.

The Witness: Page 6.

The Court: Capital stock issued?

A. No, sir, the next one, percentage of repairs to building from 1924 to 1942, inclusive. The last page has the same information regarding equipment, cost of equipment each year and repair during the year and percentage.

Mr. Hotz: If Your Honor please, before, in one of these exhibits, the value of the building was set forth in a sum total, along with other things. Here is the cost of equipment. Maybe this exhibit straightens that all out. That was the intention of it. These exhibits were all a part of one general plan of showing the cost.

The Court: Did you make an offer?

Q. Have you examined it all the way through?

A. Yes.

Q. Have you explained what it is? A. Yes, sir.

[fol. 32] Q. Does that show, for instance, the cost of equipment on the last page, in 1924, and then on up to 1942? A. Yes, sir, at the end of each year.

Q. And the repairs placed upon it each year?

A. Yes, sir.

Q. And it shows the cost of the building and the repairs to the building, beginning with 1924 up to 1942, is that right? A. Yes, sir.

Q. And then it shows, of course, the capital stock investment for 1924, and then showing that there was no change after 1925? A. Yes, sir.

Q. And the growth of the surplus of the business from 1924 right on up to 1942? A. Yes, sir.

Q. And the first page is a summary of them all, is that right? A. The first page is a comparative balance sheet beginning and ending with that period.

Q. That was what the balance shows, December 31, 1923, to December 31, 1942? A. Yes, sir.

Q. Showing increase or decrease?

[fol. 33] A. During that same period.

Q. And that takes in fixed assets, such as real estate, building, laundry machinery, power equipment, dry cleaning equipment, and all the rest shown on page 3 of that exhibit? A. Yes, sir.

Q. I will ask you if that exhibit was prepared under the usual and customary and standard method of making an exhibit of that type to show the assets and growth during the period of time as shown? A. Yes, sir.

Q. Is that the way they are ordinarily and customarily made up?

A. We make one of these each year, a comparative statement, and this is for the entire period.

Mr. Hotz: We offer in evidence Exhibit No. 6.

Mr. Murphy: May I ask one question of the witness?

The Court: You may.

Mr. Murphy: Q. Will you turn to the next to the last page of Exhibit 6, being the item headed, "Percentage of Repairs to Building from 1924 to 1942, inclusive." The first item of figures is headed "Value of Building."

A. Yes, sir.

Mr. Murphy: If the Court please, without waiving our [fol. 34] position and with the hope of getting along a little, and notwithstanding the remoteness of a number of the items, we will have no objection to this particular page if counsel desires to segregate it from the rest of the exhibit.

The Court: How about the next page, Percentage of Repairs?

Mr. Murphy: We object to every other item and page of the exhibit for the same reasons as heretofore given in the objection to Exhibit 4, and I particularly call the Court's attention to the fact that this last page "Percentage of Repairs to Plant Machinery" includes obviously, on its face, all machinery purchased over a period of twenty years and there is no evidence here as to how much of that was there in 1942. It is obvious that much of it was not. It is a cost of all equipment bought over twenty years and really throws no light whatever on what was there in 1942, or what the value of the machinery was in 1942.

The Court: The last item is 1942. Can you lay a better foundation for the last sheet? Can you segregate the machinery, or time when this machinery was purchased, and explain these items? For example, it shows $6,358.43 purchased in 1942.

Mr. Hotz: No, it shows repairs, if Your Honor please. [fol. 35] Q. Mr. Hillmer, just explain to the Court how was that sheet No. 7 that you have there, "Cost of Equipment," and then in the next column there is "repairs," that were made to the equipment, is that right?

A. Yes, sir.

Q. Explain where you got that and how those figures were made up.

A. This page was made to show the percentage of repairs each year that are made to the equipment. The repair item is in the expense. That is gone. That is taken off the books, written off each year, and the equipment balance is the amount at the end of each year, and this schedule was prepared to show the percentage of repairs made to the equipment.

Q. The first column, the cost of equipment—

A. At the end of each year, yes.

Q. And that cost was the increase over the previous year? That was the cost of the equipment that was added, is that right? A. The net equipment, yes.

Q. The net equipment—in other words, let's take the year 1941. It shows a certain figure there of the cost of equipment up to that time, and then it shows a greater number in 1942. It shows that the cost of the equipment was increased by that amount, is that right, from 1941 [fol. 36] to 1942, and so on up, with the column?

A. Yes, sir.

Q. And the amount of the repairs are on the other side? A. Yes, sir.

Mr. Murphy: I would like to ask the witness some questions with respect to this particular page, Your Honor

The Court: Go ahead.

Mr. Murphy: Q. Referring to this last page, or page 7 of Exhibit 6, taking the first item at the head of the column under the heading "Cost of Equipment," I take it that was the book record, cost paid for the equipment up to the year 1924?

A. That is correct. The books are maintained on a cost basis.

The Court: Up to 1924?

Mr. Murphy: 1924 is the first item.

Q. (By Mr. Murphy) As you go down the column the amounts increase. I take it from that that each year additional equipment would be purchased and so there would be a larger figure each year, is that correct?

A. Yes, sir.

Q. (By Mr. Murphy) During that eighteen-year period many items of machinery that were there in 1924 and [fol. 37] 1925, for instance, were worn out and discarded, were they not, and were not there in 1942? A. Yes, sir.

Q. (By Mr. Murphy) So that the figure at the bottom of this column opposite the line 1942 in no way reflects even the cost of machinery on hand in November, 1942, does it?

A. No, sir, that wasn't the purpose of that schedule.

Q. (By Mr. Murphy) It covers all the money that the Kimball Laundry Company paid out for machinery during that eighteen-year period and prior to that, because you started out with a considerable amount in 1924?

The Court: What was the purpose of this schedule? What was it you were trying to demonstrate?

A. The percentage of repairs, the upkeep of the equipment that they had spent during this period.

Mr. Murphy: I can't see how even that item would be of any help.

The Court: I am wondering if he has a study of the book value from year to year of the machinery that was in the building. Did you prepare a study with that purpose in view?

A. Yes, sir.

The Court: Where is that?

[fol. 38] Mr. Hotz: That was one of these other exhibits.

The Witness: You mean the purchases by year?

The Court: I mean the book value they carry this machinery at from year to year, the machinery on hand, adding the wear and tear and adding the repairs.

A. The repairs weren't added. The repairs were charged off to expense. These figures in the first column show only the cost of the machinery at the end of the year.

The Court: Showing the machinery on hand?

A. Yes, sir.

The Court: That would be after deducting the wear or depreciation? A. No, sir, this is all cost.

The Court: Fixed money cost?

A. Yes, sir, cost of the equipment in that first column. Depreciation is not involved in this table.

Mr. Murphy: Q. And it includes the cost of all the machinery purchased during all that period, a considerable portion of which was no longer in being in November, 1942? A. Yes, sir.

Q. That item shows the actual total cost of it all, does it not? A. Yes, sir.

[fol. 1055-3] KIMBALL LAUNDRY COMPANY

Comparative Balance Sheet

Assets	Dec. 31, 1923	Dec. 31, 1942	Increase Decrease
Cash Accounts Receivable, Investments and Supplies:			
Cash	$ 9,002.81	$ 42,132.41	$ 33,129.60
Accounts receivable	23,413.54	17,729.10	5,684.44
Supplies	4,475.11	11,166.16	6,691.05
Defense stamps		120.50	120.50
Stocks and bonds	21,763.38	900.00	20,863.38
Notes receivable		44,000.00	44,000.00
Personal accounts	300.58	27,516.85	27,216.27
Unexpired insurance premiums	812.15	1,260.20	448.05
Fixed Assets:			
Real estate	48,152.00	53,189.50	5,037.50
Building		205,035.12	205,035.12
Laundry machinery	4,955.89	311,632.06	306,676.17
Power machinery		27,098.36	27,098.36
Dry cleaning equipment		59,049.75	59,049.75
Cold storage equipment		4,721.10	4,721.10
Feather machinery		2,793.54	2,793.54
Office equipment	1,068.50	9,964.38	8,895.88
Delivery cars	28,266.40	9,881.96	18,384.44
Building abandoned in 1924 (old)	5,330.00		5,330.00
Equipment abandoned in 1924 and 1925 (old)	25,299.20		25,299.20
Equipment which was abandoned and fully depreciated at Dec. 31, 1923 $47,146.81 Less depreciation 47,146.81			
	$172,839.56	$828,190.99	$655,351.43
Liabilitips			
Personal accounts payable		$ 7,408.12	$ 7,408.12
Accrued taxes	$ 1,501.00	8,299.04	6,798.04
Reserve for bad debts	796.13	911.31	115.18
Reserve for depreciation	4,420.60	366,235.91	361,815.31
Capital stock	50,000.00	250,000.00	200,000.00
Surplus	116,121.83	195,336.61	79,214.78
	$172,839.56	$828,190.99	$655,351.43

[fol. 1055-4] KIMBALL LAUNDRY COMPANY

Year	Capital stock issued	Capital stock and surplus	Officers' salaries	Per cent of officers' salaries to capital stock	Per cent of officers' salaries to capital stock and surplus
1924	$ 50,000.00	$166,121.83	$ 19,800.00	39.60%	11.92%
1925	250,000.00	259,667.48	18,800.00	7.52	7.24
1926	250,000.00	256,373.05	18,800.00	7.52	
1927	250,000.00	267,064.02	18,800.00	7.52	7.04
1928	250,000.00	293,174.68	17,500.00	7.00	5.97
1929	250,000.00	324,461.35	19,445.00	7.78	5.99
1930	250,000.00	353,764.29	28,420.00	11.37	8.03
1931	250,000.00	387,668.68	28,680.00	11.47	7.40
1932	250,000.00	416,236.01	24,572.50	9.83	5.90
1933	250,000.00	423,538.26	9,220.00	3.69	2.18
1934	250,000.00	404,716.56	18,188.65	7.28	4.49
1935	250,000.00	456,071.81	19,040.00	7.62	4.18
1936	250,000.00	474,843.30	19,680.00	7.87	4.15
1937	250,000.00	472,276.01	19,620.00	7.85	4.15
1938	250,000.00	473,721.28	20,220.00	8.09	4.27
1939	250,000.00	474,444.82	20,092.40	8.04	4.24
1940	250,000.00	456,728.81	22,414.44	8.97	4.91
1941	250,000.00	438,961.97	27,400.00	10.96	6.24
1942	250,000.00	436,059.28	22,550.00	9.02	5.17
	Total		$393,242.99		
	19 year average		$ 20,697.00	8.28%	5.33%

[fol. 1055-5] KIMBALL LAUNDRY COMPANY

Year	Capital stock issued	Capital stock and surplus	Dividend paid	Per cent of dividend to capital stock	Per cent of dividend to capital stock and surplus
1933	$250,000.00	$423,538.26	$ 20,000.00	8.00%	4.72%
1936	250,000.00	474,843.30	15,000.00	6.00	3.16
1937	250,000.00	472,276.01	15,000.00	6.00	3.18
1938	250,000.00	473,721.28	10,000.00	4.00	2.11
1939	250,000.00	474,444.82	51,600.00	20.64	10.88
1940	250,000.00	456,728.81	24,300.00	9.72	5.32
1941	250,000.00	438,961.97	12,000.00	4.80	2.75
	Total		$147,900.00		

[fol. 1055-6] KIMBALL LAUNDRY COMPANY

Percentage of Repairs to Building
from 1924 to 1942, inclusive

Year	Value of building	Repairs	Percentage
1924	$168,451.38	$ 748.53	.44%
1925	170,485.53	289.28	.17
1926	170,485.53	310.45	.18
1927	170,485.53	395.24	.23
1928	170,485.53	831.88	.49
1929	170,485.53	1,985.69	1.17
1930	172,333.53	4,103.68	2.38
1931	172,333.53	2,152.32	1.25
1932	172,333.53	1,157.12	.67
1933	172,333.53	537.77	.31
1934	172,333.53	997.25	.58
1935	205,035.12	3,191.80	1.56
1936	205,035.12	4,430.80	2.16
1937	205,035.12	3,056.91	1.49
1938	205,035.12	1,726.15	.84
1939	205,035.12	1,433.34	.70
1940	205,035.12	2,573.65	1.26
1941	205,035.12	1,427.14	.70
1942	205,035.12	3,795.35	1.85
Total		$ 35,144.35	
Average—19 years		$1,849.68	1.00%

[fol.1055-7] KIMBALL LAUNDRY COMPANY

Percentage of Repairs to Plant Machinery and Equipment from 1924 to 1942, inclusive

Year	Cost of equipment	Repairs	Percentage
1924	$231,347.00	$ 1,154.44	.50%
1925	215,621.03	6,347.00	2.94
1926	221,779.37	8,432.28	3.80
1927	240,590.88	5,855.84	2.43
1928	248,658.12	6,767.51	2.72
1929	291,642.91	13,572.30	4.65
1930	292,258.49	4,483.89	1.53
1931	302,229.77	5,963.88	1.97
1932	309,929.82	4,050.29	1.31
1933	328,178.60	3,895.36	1.20
1934	339,593.46	6,142.80	1.81
1935	346,450.48	6,770.99	1.95
1936	361,445.69	7,380.96	2.04
1937	376,401.68	5,500.77	1.46
1938	376,129.06	5,059.71	1.35
1939	369,635.24	6,306.56	1.71
1940	387,192.61	4,588.53	1.19
1941	402,382.16	7,217.91	1.79
1942	405,294.81	6,358.43	1.57
Total		$115,849.45	
Average—19 years		$6,097.39	1.92%

Q. Handing you Exhibit 7, I will ask you to state what that is?

A. This exhibit shows the gross income from laundry operations, 1924 to 1942, up to November 21st, inclusive.

Q. By years?

A. Shows the operations for each year taken from the [fol. 40] books.

Q. And up to how far in 1942? A. November 21st.

Q. November 21, 1942? A. Yes, sir.

Q. So that it was not a full year? A. No, sir.

Q. That is taken from the books and records of the Kimball Laundry Company? A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit No. 7.

Mr. Murphy: Petitioner objects to Exhibit 7 for the reason that the same is incompetent and immaterial and does not tend to prove or disprove any issue in this case, and does not constitute any measure of damage, nor any element of damage or just compensation, and I refer particularly to the fact that the exhibit covers business income and has no bearing on the physical structure or valuation of the structure or machinery or equipment.

The Court: Mr. Hillmer, you say, "Herewith statement of gross income from all departments of your company." From all departments. Did that include the investment department? A. No, sir.

[fol. 41] The Court: What do you mean by the departments? The different operations of the laundry?

A. Laundry work, dry cleaning, dyeing, and different departments of the laundry.

The Court: That is its income derived from the laundry work, not the interest or investments or anything of that kind? A. No, sir.

The Court: You say it is gross? A. Yes, sir.

The Court: Do you have a similar statement of the net? A. Yes, I think so.

The Court: From these items you have given here, all of the expense of the operation, salaries, and that sort of thing came out? A. Yes, sir.

The Court: Give us the statement where it is net to

the company and then we will know what the net earnings were during those years.

Q. What does Exhibit No. 4 show?

A. The first column shows the net profit from these operations.

The Court: I will receive this if you will attach a single column of the net earnings. I excluded this (Exhibit 4) [fol. 41] because it contained a lot of other items I thought should not be in there. If you can fix it up that way, so that we can get the net earnings, I will permit it. As to some of these years it is too remote, but it can be prepared.

Mr. Hotz: This particular Exhibit 4 doesn't have anything on it.

The Court: I excluded it and let us get one according to my direction.

Mr. Murphy: I would like to be heard on this point of the earnings from the business.

The Court: What do you want to be heard on? That it is no evidence at all as to what the business was worth?

Mr. Murphy: That is right. In a rental case, Your Honor, the only evidence of value is—first of all, the only reason for evidence of value is as one of the elements upon which to determine a rental return. That is sort of one step away from the issue. A further step in this type of a case as to income is not permissible.

The Court: Income and earnings are different. This is the earnings of the business and I am trying to segregate that from the income. He has been trying to prove income and I am trying to hold it down to the actual earn- [fol. 43] ings of the business in dollars and cents.

Mr. Murphy: Our position is, Your Honor, not only is the one item properly excluded, as the Court has ruled, but that either item does not constitute proper evidence.

The Court: I don't think you need to spend any time on that. I am persuaded that any element that appeals to your reason as going to the value of property that you can place some reliance upon, you may consider with all the other facts. That is my consistent ruling in all of these cases and I shall not deviate therefrom now.

Mr. Murphy: May I suggest that with Exhibit 7, if admitted, and with this sort of instruction, it seems to complicate the record? I wonder if it might not be more clear if we excluded 7 until we get—

The Court: I have asked counsel to prepare a new exhibit and will receive it as a single document. Let us not get it involved with these matters that we do not seem to be in agreement on.

Kimball Laundry Company Exhibit 7, appearing in Vol. III at page 1056.

[fol. 1056] D. Ex. 7 (Refused)

Kimball Laundry Company, October 28, 1943
Omaha, Nebraska

Gentlemen:

Herewith statement of gross income from all departments of your company from 1924 to 11-21 1942, inclusive.

1924	$306,244.76
1925	329,007.08
1926	353,560.14
1927	369,641.16
1928	388,157.32
1929	409,502.09
1930	421,344.30
1931	406,816.12
1932	340,315.36
1933	274,913.90
1934	306,730.01
1935	326,011.55
1936	355,272.74
1937	365,861.50
1938	346,287.29
1939	344,819.70
1940	342,752.37
1941	380,599.35
1942	360,617.90

Yours very truly,
C. L. Hillmer Company
C. L. Hillmer
Certified Public Accountant

Q. I am handing you Exhibit Number 8.

Mr. Hotz: I am not so sure but that most of that ex-

[fol. 44] hibit is in another one which Your Honor ruled upon, but I have eight exhibits and I want to have them all.

The Court: All right.

The Witness: It is a duplicate of another previous exhibit.

Q. Is it a duplicate of 4? A. Yes.

Mr. Murphy: It is offered, Exhibit 8?

Mr. Hotz: No, it is the same as another exhibit. We offer to prove by this witness what is disclosed by the exhibits, in each case, which have been offered, Exhibits 1 to 7, inclusive.

The Court: I assume you have already done so.

Mr. Hotz: I am offering to make the proof of what the exhibits show.

The Court: He has already testified as to what they are. If there is anything he has not disclosed, why, of course, go ahead.

Mr. Hotz: The exhibits themselves would show. We didn't take every item.

The Court: You have books here which I am inviting you to use, but you do not seem to be interested.

Q. Again I will ask you the question if whether or not the information that is contained on all of these ex-
[fol. 45] hibits, 1 to 7, may reflect what is shown on the books and records of this company? A. Yes, sir.

Mr. Hotz: From the books here in Court, aside from the exhibits, we offer to make proof from this witness what those exhibits show.

Mr. Murphy: Objected to for the same reason, the general objections to the exhibits, and for the further reason that the offer is broader than the original questions, or all of them together, and indefinite and calling for a conclusion of the witness.

The Court: I am asking you again to state if you, as an expert, registered, licensed accountant can, from these books now in the courtroom, disclose for the benefit of the Court and Jury, costs of real estate from time to time as shown by the books of the company, giving the dates and the amounts? Can you, at the same time, in connec-

tion with the real estate, show the cost of the buildings from time to time, when they were expanded and the dates of such expansion, and the cost added thereto? Can you from these same books show the book value which the company has placed upon the machinery in said laundry during the years 1924 to 1942, when it was taken [fol. 46] over by the Government; that is, the book value and cost value carried separately and apart from the other items of costs of other investments and bonds and earnings, and all that sort of thing? Can you do that?

A. Yes, sir.

The Court: Very well. Again, for the purpose of the record, your offer will be overruled.

Q. The Court has made some rulings here, Mr. Hillmer, which you heard in connection with these exhibits, and I am going to try and simplify matters, if I can, by asking you a few questions, that, as I understand it the Court has stated might go in the record, and see if you can tell from those exhibits, read into the record, that which is admissible, so that we can have a composite exhibit made up.

The Court: We are trying a lawsuit and I will be glad to help you and I thought I made it clear. I deem the evidence of cost as some evidence of value. In order to determine the fair value of the possession and use of this property, there are many elements which I think will establish fairly what that value is. One of the elements is the cost. If it is remote, it doesn't have as much evidential value as if it were new and late, but it is some- [fol. 47] thing, and in this situation here we can compare these different years as to what the cost was. We can get some idea of the depreciation from his account, but you must not involve in these statements evidence that we can not receive and that would be prejudicial to the defendant to permit them in the record. I am asking you to segregate out the items which I think are competent and proper, and unless something else develops and until I am further advised, I think they will be received. If you can do that it will help all of us, and if you can not, we will stand on the record and make it as best as we

can. It is half-past three, and I am wondering if you can not get this witness to fix up some statements along that line and bring him in in the morning. Is there some other witness you can call until you call Mr. Hillmer in the morning?

Mr. Hotz: Yes.

Mr. Murphy: May I ask the witness a couple of questions I think might help on these?

The Court: Yes.

Q. (By Mr. Murphy) Do these books on the Kimball Laundry Company contain a statement showing the book value of this Kimball building some time in the year 1942? [fol. 48] A. Yes, sir.

Q. (By Mr. Murphy) Based upon its original cost, less depreciation and less repairs?

A. No, the depreciation is carried separately. This account of the building shows only the cost and no repairs. The repairs are all charged to expense. It includes only the cost to the building.

Q. (By Mr. Murphy) Don't your books show in your financial statement of, let's say, January 1, 1942, a value of the building as of that date? A. Yes, sir.

Q. (By Mr. Murphy) And that value is not the original cost, is it? A. Yes, sir.

Q. (By Mr. Murphy) You carried in your financial statement of 1942, as an asset, the total cost of your building back in 1924?

A. Yes, accumulated cost, the amount that has been spent on the building, and that is shown as cost on our statements.

Q. (By Mr. Murphy) In your financial statement as of January 1, 1942, your financial statement, you list in there as an asset the cost of all of the machinery that the Kimball Laundry Company has purchased all the time they have been down there at the full total cost?

A. We take depreciation each year.

Q. (Mr. Murphy) That is what I am getting at.

A. Yes, depreciation is shown in the ledger, also.

Q. (By Mr. Murphy) Can't you, from those books, show us the figure, tomorrow morning when you come

back here, of the book value of that building as of November, 1942, based upon its original cost, less depreciation down over the years, and in the same manner as to the machinery and equipment?

A. That is a pretty big order.

Q. (By Mr. Murphy) Including machinery actually on hand?

The Court: I want the dates of the different valuations, if there are more than one—the dates of these different costs.

Q. (By Mr. Murphy) What I am trying to get at—I haven't examined your books, but generally, as I understand it, a business compiles an annual statement and shows their condition? A. Yes, sir.

Q. (By Mr. Murphy) Whether they are ahead or behind, and that statement lists certain assets and certain liabilities, and in the assets there is a valuation placed upon the physical assets as of the date the statement is [fol. 50] made. That is a common accounting practice, isn't it? A. Yes, sir.

Q. (By Mr. Murphy) When such a company owns real estate, land, and a building thereon, it is a common accounting practice to list a certain value of that building and land, is it not?

A. Yes, you mean the depreciated value shows cost less depreciation?

Q. (By Mr. Murphy) Yes. That is correct. Could you give us that figure each year, or January 1, 1942, or November 22, 1942, from these books? I don't mean now, but can you do it over the evening and have it for us in the morning?

The Court: I want it for all the years and when you finish it you can furnish it to me.

Mr. Hotz: About this matter of depreciation. Just what is the depreciation?

The Court: Are you through, Mr. Murphy?

Mr. Murphy: Not quite. I want to carry out what the Court has stated.

Q. (By Mr. Murphy) The Court has suggested you show it for each year during this period of years. I would

like to have you do the same thing as to the machinery and equipment and take into account not just the new [fol. 51] machinery purchased year by year, but also take into account the machinery discarded year by year, so that your statement as of 1942 will show the book value of the actual machinery and equipment on hand at that time. Can you do that?

A. I don't know if I can do that overnight. There is a lot of machinery. We have all that information. I can give you the depreciated values as of December 31, 1942, or any period, showing cost and depreciation on the books.

Mr. Murphy: Bring that in. Maybe that will suffice.

A. I can do it for each year. I can make those from the depreciation records.

The Court: Don't do it unless your counsel directs you to.

Q. How much of that information do you have in the Exhibits 1 to 8? A. Just the cost.

Q. Your depreciation is there?

A. Yes, but not for each item. It is by the year. These detailed schedules we have of the company's machinery and equipment cover about four big pages, each year's purchases, covering four big pages, so it isn't just going [fol. 52] to the books and seeing what their increase is. It is taking these schedules and figuring out what the increase and depreciation was each year.

Q. The depreciation you are talking about is depreciation for income tax purposes, isn't it? A. Yes.

Q. And it does not reflect the actual depreciation, as a matter of fact, on the particular machine? It is for income tax purposes, is that right? A. Yes, sir.

Q. And where you take off depreciation on the building you do it simply on the percentage that is allowed for income tax purposes? A. Yes, sir.

Q. And that does not reflect that there is an actual depreciation, is that right? A. Yes, sir, a great many times we write off at the end of the year equipment that has been fully depreciated and still in use. After we take the full ten years we get it off the books because it is no longer depreciation.

Q. And there are replacements and repairs and rehabilitation that goes back into a particular machine?

A. Repairs are not capital. That goes as an expense.

[fol. 53] Q. Any part of the machine that was replaced would be a capital expenditure?

A. If it was large. If it was small, it would be charged to expense.

Q. So that the depreciation we are talking about is merely a depreciation for income tax purposes, is that right? A. Yes, sir.

Mr. Hotz: Of course, we maintain that is not a proper item to be taken into consideration in arriving at the value of a fixed asset such as buildings or machinery or equipment. It is a proper item to take into consideration to try to find out how much cash money you have got left after payment of income taxes.

The Court: I do not know what you are talking about. I have not seen the document yet.

Mr. Hotz: Everything is all right for him to bring back excepting these numerous items of particular machines and I don't see why we should be put to the trouble and work of trying to go through all those numerous machines. Why can't we take their machine account as it stood at the end of the year?

The Court: That is for you to say. If you will get the [fol. 54] figure of the book value, as I have suggested, I don't care how you get it.

[fol. 55] Mr. Earl H. McDougal, produced as a witness on behalf of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. Please state your name. A. Earl H. McDougal.
Q. What has been your business in the past years?
A. At the present?
Q. I mean in the past, up until recently?
A. Office manager and credit manager.
Q. For the Kimball Laundry Company?
A. For the Kimball Laundry Company.
Q. And for how many years?

A. I was there about fifteen months until at the time the government took it over.

Q. And you reside, I suppose, here in the City of Omaha? A. I have.

Q. And have for a great many years? A. I have.

Q. In your department, while you were working at the Kimball Laundry, did you have charge of the accounts that showed the number of customers and various departments of the business; that is, the general bundle work, the finished family laundry, flat work, damp wash, [fol. 56] rough dry, dry cleaning and all those items?

A. I did.

Q. Did you have under your supervision and direction a number of accounts that they had on the trade routes, the number of customers, family customers, and the downtown or commercial accounts? A. I did.

Q. You say you were with the Kimball Laundry for how long—a period of fifteen months until about the time the government took it over? A. Yes, sir.

Q. In what books were those accounts kept of the Kimball Laundry Company?

A. We had regular books we kept there for our accounts.

Q. I am speaking now just about the routes?

A. We had a regular set of books we kept on the routes.

Q. How were these routes handled? Just explain how that was done through the route men, the obtaining of the account.

Mr. Murphy: Objected to as incompetent and immaterial; not within the issues of this case, and involving [fol. 57] something not taken by the government in this action.

The Court: I understand what counsel is leading up to. Ask him another question and I will see what you are leading up to.

Q. The obtaining of the trade account, the family customers, or the commercial customers—how was that individual account obtained? Just how was that done?

A. A great many times our route men went out and solicited our customers and these customers we had had for a great many years—

Mr. Murphy: I move to strike that last statement.

The Court: Objection will be sustained.

Q. What I am getting at is how do you pay the route men for that? How was that handled? Did they get a commission or salary, or both?

A. Our route men are guaranteed a certain salary and up and above the salary was a certain commission on the amount of business they got.

Q. The way this laundry work and dry cleaning was handled was that the route men with their wagons would go out to the homes and the laundry or other apparel that was desired to be dry cleaned or laundered was brought to the laundry? A. That is right.

[fol. 58] Q. And then those men would take that back to the customer? A. Yes, sir.

Mr. Murphy: Objected to for the same reason previously stated. I think the questions now disclose the line of testimony and it particularly involves matters not in issue in this case, the business and customers and routes.

The Court: Sustained. I think the material thing that you are trying to reach, Mr. Hotz, is the volume of business that was transacted. It does not matter how business was brought in. The fact it was a going concern and it had a certain volume of business each year, a certain amount net, and it will give you some idea of the value of the property, but beyond that, it does not matter how they brought in the merchandise so long as it was brought in. The streets were open and the alleys were open and to all intents and purposes it is still available. What we are trying to get at is the use of this property.

Q. Calling your attention to Exhibit 10, I will ask you to state what that is?

A. That shows a period from 1936 to 1942. That is general bundle work, finished family, flat, damp wash, [fol. 59] rough dry, blankets and curtains, dry cleaning, towel supply, miscellaneous.

The Court: That is the volume of business you were doing? A. That is right.

The Court: And it is measured by what—tons, or pounds, or pieces?

A. It all depends; some of it is on pieces, but some on bundles.

The Court: But the exhibit is in there for dollars and cents? A. Yes, in dollars and cents.

Mr. Hotz: On the right hand side is the total for 1936, 1937, 1938, 1939, 1940, 1941, 1942, up to November 21st, and then down at the bottom it shows the total for the particular style of work.

The Court: There is nothing in there but laundry operations?

Mr. Hotz: No, nothing but laundry operations. We offer in evidence Exhibit 10.

Q. You made that exhibit up yourself? A. Yes, sir.

Q. It is correct, from the books and records of the Kimball Laundry Company? A. Yes.

[fol. 60] Mr. Murphy: If the Court please, petitioner objects to the offer of Exhibit 10 for the reason said exhibit is incompetent and immaterial, and covering, as it does, solely business earnings, is not a proper element of proof of just compensation in this condemnation action. I might state to the Court that I have in my hands a copy of an opinion of the United States Supreme Court just handed down on February 25, 1946, that I would like to have—

The Court: I have it right here. I have not had time to study it yet. I got it just this morning. You have this in dollars and cents. I am inclined to think it is admissible if it were in poundage or volume so as to establish the amount of business they were doing.

Mr. Hotz: That is the best way to get it.

The Court: There are so many things you are getting into again. If we had some idea of the volume of work by poundage—

Mr. Hotz: That doesn't mean anything unless you can tell what it is in dollars and cents.

The Court: You take out the element of management. One manager could go in and make a fortune on the same poundage that another fellow could go broke on, so all these things are an element. I think I will take an ad-
[fol. 61] journment until morning. See if you can get that in poundage. If you can not, I am a little fearful it is not in good form the way you have it.

1:30 P. M., March 5, 1946.

(Last objection and ruling of the Court read.)

The Court: Let the record show since the adjournment, consideration has been given to this document. I am persuaded that the volume of business is competent and some evidence of the capacity of the plant, but I am further persuaded that unless the dollars and cents items that are set up are broken down into poundage that the document is not competent. I appreciate, as we all do, that the Court should be very liberal in admitting in evidence any evidence that will assist in arriving at the fair market value of the use of this property that was taken. This document, if it showed the poundage, or if it could be supplemented with a statement of the poundage, would show to some extent the capacity of the building and of the plant, what it was capable of doing, and this would be a consideration that a prospective lessee and the owners would necessarily have in mind if they were dealing at arm's length. Under the Utah case, as under the General
[fol. 62] Motors case, that which is personal to the owners can not be considered. I can not allow it to interfere with the valuation or determination by the jury of the value, which is the basis of our inquiry. Any kind of evidence, even though it is remote, I have concluded that the Court should permit because of the difficulty in proving up in this case, and since this case has to stand by itself—it is the only laundry business that I know of—it is surely the only one in Omaha, and there are no records or decisions on laundries. Consequently, we have the problem of how to prove up in Nebraska in condemnation of laundries. The rule has been established that the cost is incompetent, but in the situation we have here

as to proof, I feel that greater latitude should be allowed than where you can compare one firm with another, where you have numerous buyers in the market dealing at arm's length. It impresses me that the proof here that may be available and that would be competent is proof of the capacity of the business, was it running at full capacity, or was the additional capacity available; the size of the building, which would mean proof of the footage, the floors, the location of the building in the town, as value, could be established probably by competent proof. From that you might be able to determine [fol. 63] what the value of the fee property was, what was the whole plant worth, and from that probably deduce what was a fair rent for the use of that property of which the owners had been deprived. Proof of that kind might be made. Then, as to the actual cost, we should know, of course, when the money was invested, we should know how old the building is—we take that into consideration with all the other evidence. When you begin talking to us about what the business is earning in dollars and cents, that is not the basis upon which we can make the appraisal. We are not appraising the well-known ability of the owners of this property, the officers of the property as operators of a laundry. They have demonstrated that way beyond their fellows. That is not a measure of the fair value on the open market for the use of this property. I hope I have made myself clear. I will help you as far as I can. I have given you an opportunity to make your proof as best you can, but keep within the rules laid down in the Utah case and in the Chicago case, the General Motors case. If you can connect up and if you can assure me you expect to break down these dollars into poundage or parcels or pieces; if you can do that in any way, I will receive it, and if you do not, we [fol. 64] will have to strike it later. It is up to you now, Mr. Hotz.

Q. When we had Exhibit 10 yesterday while you were on the witness stand, a statement was made with reference to poundage, if you had any record of poundage:

Did the Kimball Laundry Company keep any record of laundry as bundles distinguished from pieces?

A. We did on certain types of laundry, but that wouldn't cover your laundry, due to the fact that there is no poundage on your finished shirts.

Q. There is no poundage on many other items?

A. And many other, there is no poundage in the laundry business.

Q. For instance, in the dry cleaning?

A. No poundage on your dry cleaning.

Q. Isn't it true that Mr. A. L. Jacobberger does, however, have a very complete statement of the number of bundles over this same period that is covered by that?

A. That is correct.

Q. And Mr. A. L. Jacobberger can give us that, but you can not give us anything in connection with poundage or bundles? A. No, I can not.

Q. That was not in your department? A. No.

[fol. 65] The Court: Do you have any recollection of what the poundage or bundles would average throughout the months or days or weeks?

Mr. Hotz: I will furnish that with another witness. That is not under his jurisdiction.

Q. To refresh our memories on this, you might explain what that exhibit is, Number 10.

A. This exhibit covers from 1936 until the end of 1942, at the time the laundry was taken over.

The Court: I am receiving No. 10.

Kimball Laundry Exhibit No. 10, appearing in Vol. III, at Page 1057.

[fol. 1057] D. Ex. 10 (Received)

Itemization of Kimball Laundry Company Classification of Laundry Work from 1936 to Nov. 21, 1942 Inclusive, with Totals for Each Year and for the Period.

	General Bdl Work	Finished Family	Flat	Damp Wash	Rough Dry
1936	$109,842.83	$26,637.42	$26,754.33	$72,895.91	$48,948.71
1937	109,954.51	26,963.80	28,704.43	69,828.39	50,595.32
1938	96,878.16	34,126.76	22,990.94	62,598.14	46,571.66
1939	97,932.48	39,154.45	22,779.30	53,618.74	42,461.40
1940	100,966.34	37,440.71	26,891.75	48,788.99	40,742.69
1941	114,309.50	43,838.12	31,596.84	51,754.12	41,048.06
1942	109,736.92	45,635.34	28,727.13	40,722.13	37,065.63
Tot	$739,620.74	$253,796.60	$188,444.72	$400,206.42	$307,433.47

	Blankets & Curtains	Zoric Dry Cleaning	Towel Supply	Miscl	Total
1936	$12,770.98	$52,842.65	$4,579.91		$355,272.74
1937	12,520.92	62,138.15	5,155.98		$365,861.50
1938	16,063.91	60,605.15	6,347.57		$346,182.29
1939	18,167.50	64,171.64	6,534.19		$344,819.70
1940	19,647.90	66,836.63	1,335.59	$101.77	$342,752.37
1941	21,523.20	76,243.91		285.60	$380,599.35
1942	20,626.75	78,103.70			$360,617.60
Tot	$121,321.16	$460,941.83	$23,953.24	$387.37	$2,496,105.55

* To November 21, 1942—Estimated Total for year $400,000.00

Certified as correct
Earl H. McDougal
Auditor.

Mr. Murphy: May I interrupt?

Mr. Hotz: Wait until the witness finishes.

A. This is broken down into the various departments of the laundry showing grand totals by departments and the total for the year and the total for the accumulated years. This record is taken from the general ledger.

The Court: It is the document we had last evening?

Mr. Murphy: Did I understand the Court to say it was received?

The Court: I made the remark that if he would break it down into quantity so that we could understand the [fol. 66] capacity of the plant it might be descriptive,

and if he would give me that assurance I would receive it now in the record, with the understanding that if he does not supply that supplemental evidence that I will strike it.

Mr. Murphy: That is received solely for the purpose of showing the capacity of the plant?

The Court: That, in connection with other testimony.

Mr. Hotz: I have certified copies here. May I pass that to the jury?

The Court: Not now. We can do that when we come to the argument, or later. Do you propose to give each member of the jury a photostatic copy?

Mr. Hotz: Yes.

The Court: Do you have photostats of the exhibits that the defendant may offer?

Mr. Hotz: No, I haven't. I don't know what they are going to offer. That would be up to them.

The Court: We have to treat everybody alike. I can not permit you to over-emphasize certain exhibits over other exhibits. I will send them all to the jury when they go to the jury room, or if anyone has some copies we will give them to them now, but I can not permit one side to over-emphasize their exhibits over other written documents.

Mr. Hotz: Ordinarily you pass the exhibit around and [fol. 67] the jury sees what they are talking about.

The Court: We will send them all to the jury room when the jury goes out, and while you are arguing your case, if you wish, they may examine your exhibits. Beyond that I will not allow it.

Q. I will hand you Exhibit 11 and ask you to state whether or not that exhibit was compiled under your direction and supervision, or by yourself, rather?

A. I compiled it.

Q. You compiled the exhibit yourself? A. Myself.

Q. Did you take it from the records of the corporation?

A. I took it from the records of the Kimball Laundry Company. We have a Fantom Fast Cardex with the family laundry service. The account was made from there.

We also have a card system on all special customers who have laundry service in our specialty department—what we call specialty is drapes, cleaning of pillows, renovating of pillows, rather, and blankets. The account was taken from that, and then we keep a special record of our call customers.

Q. Is that shown on the exhibit? A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit 11.

Mr. Murphy: Petitioner objects to the offer of Ex-
[fol. 68] hibit 11 as being immaterial and incompetent, and irrelevant, for the reason it is not evidence of the fair, market value, or fair rental value of the property, nor of the capacity of the plant, as the Court has indicated, and is not related to any issue in this case. It is evidence relating solely to skill or management and good will and number of customers and business, rather than the plant or its capacity.

The Court: I think it is some evidence of capacity. It shows the number of people it serves and the number of customers. It gives some idea of the size of the institution or establishment and it will be received for that purpose and that purpose only, the capacity and size of the institution, which goes to the question of the value of the plant which has been used.

Kimball Laundry Exhibit No. 11, appearing in Vol. III, at Page 1058.

[fol. 1058] D. EX. 11 (Received)

This exhibit shows the status in numbers of the total customer's accounts of the Kimball Laundry Company as of November 21, 1942, at the date of the taking by the United States Government. The Government went into possession of the Kimball Laundry on November 22, 1942, and none of the customers of the Kimball Laundry Company were or have been thereafter serviced by the Kimball Laundry Company.

Total of regular customers, exclusive of Specialty Department customers, on 11/21/42 15,093

Customers who delivered laundry and called for the same at the desk at the laundry, on 11/21/-42 1,500

Special customers for the cleaning of pillows, on 11/21/42 4,648

Special customers whose trade was solicited and obtained at different seasons of the year, such as at housecleaning time and for spring and summer furnishings, etc., on 11/21/42 20,802

Consisting of:

Table linen, spreads	6,810
Rugs, comforts, blankets	5,814
Lace curtains	8,178

The above shows a total of customers on the books of 26,950. There would be no duplication in the 15,093 and in the 1,500 call-desk customers.

In addition to the foregoing, there were the wholesale trade customers, consisting of hotels, apartment houses, bus lines, clubs, etc., shown on a separate exhibit giving the names of those customers and the amounts of their accounts by years.

Certified as correct
Earl H. McDougal
Auditor.

Mr. Hotz: I want to ask counsel if there is any objection to passing these exhibits to the jury at this time to examine them?

Mr. Murphy: I don't have facilities to have photostatic copies and I don't want to agree to passing photostatic copies to the jury now, because there may be some later [fol. 69] question on some of these, whether they are broken down or connected up or not.

Mr. Hotz: The Jury doesn't know much about what we are talking about.

The Court: They won't until you can analyze and get into these matters you are building up. When you

get into your case we will take a little time out and exhibit them if you wish.

Q. I now will hand you Exhibit 12 and I will ask you to state what that exhibit is and if it was prepared by you and from what source?

A. This statement covers our hotel accounts. It takes it back to the year 1938, 1939, 1940, 1941 and 1942, as of November 21, 1942. There is also a total there for a five-year period. This covers what we call our hotel accounts; that is, hotels and restaurants and any special accounts that we give special service to under special prices.

Q. And that is a detailed statement of one of the items that is listed under Exhibit 10, and also 11?

A. That is right.

Q. And this is merely the detail and supporting statement in reference to that exhibit, is that right?

A. That is correct.

Mr. Hotz: We offer in evidence Exhibit No. 12.

[fol. 70] Mr. Murphy: As to this exhibit, petitioner objects for the same reason as to Exhibit 11, and calls the Court's particular attention to the fact that this exhibit is purely a matter of dollars and cents and names of customers and is relating purely and solely to business management, rather than being of any help whatever on capacity, and I assume that these figures, anyway, are included in the other exhibit.

The Court: I don't see a dollar sign anywhere on the paper. Where do you see that?

Mr. Murphy: My paper does have dollar signs on, Your Honor, right after the name of the first customer at the top of the page. It is not carried on down. It is rather dim on the carbon copy.

The Court: See if you have the same paper I have.

Mr. Murphy: It is on this one. It is not on there. The original does not have the dollar sign.

Mr. Hotz: It should have.

The Court: Let's find out about it. What do these figures indicate?

A. That is dollars and cents all broken down under the special accounts that we have.

Q. It shows who those special accounts are?

A. That is right, under each special account.

Q. Here in the City of Omaha?

[fol. 71] A. Here in the City of Omaha.

Q. That were being serviced by the Kimball Laundry Company at the time the plant was taken over by the government; is that right? A. Yes.

Q. And incidently, you stayed right on with the government, did you not? A. Yes, sir.

Q. And are there now?

A. I am still employed by the government.

Q. And have been during the past three and one-half or more years that the government has been there?

A. That is correct.

The Court: Let me understand. In addition to the accounts that you have set forth in Number 10, are these additional accounts?

A. These additional accounts—these are included in your total, your grand total.

The Court: You are not answering my question. I have a list of accounts in No. 10 under consideration. You bring in another list. Is that a part of No. 10 that you have segregated, or is it in addition to those lists on No. 10? A. This is not an addition to Exhibit 10.

Mr. Hotz: When you say "this" refer to the exhibit [fol. 72] number at the top.

A. Exhibit 10 is showing your total volume that the laundry has done from the year 1936 to 1942, but your Exhibit 12 is not an addition. It is just to show you the accounts we have under what we call special accounts, the volume we were able to derive from that source.

The Court: What is the purpose of duplicating this matter, Mr. Hotz?

Mr. Hotz: The evidence will show later there is a difference in the valuation of commercial accounts. For instance, if a laundry did not have commercial accounts—

The Court: How are we going to separate the accounts? He says they are included in No. 10.

Mr. Hotz: Only as to the totals. This gives the itemization of it. It shows specifically just what it is.

The Court: Suppose we fasten them together and I will receive it only for the purpose of showing volume and conditionally that you couple it up with the poundage.

Kimball Laundry Exhibit No. 12, appearing in Vol. III, at Page 1059.

[fol. 1059-1] D. EX. 12, pp. 1 and 2 (Received)

Itemization by Name and Amounts in Dollars and Cents of the Kimball Laundry Company

Special Accounts for the Years 1938 to Nov. 21, 1942, Inclusive

(These totals are included in the Gross Business reported under the heading of "Bundlework")

Name	1938	1939	1940	1941	Nov. 21 1942	Total for 5 yr. period
Boquet Hotel	360.18	453.47	446.82	378.44	372.18	2,011.09
Chatham Hotel	296.26	342.34	334.40	475.30	472.77	1,921.07
Colonial Hotel	239.18	267.07	233.42	175.32	97.46	1,012.45
Conant Hotel	2,290.68	783.81	2,253.73	2,132.74	2,035.24	9,496.20
Feierman Stores	441.77	381.69	343.71	369.18	335.24	1,871.59
Hamilton Hotel	148.47	133.24	109.79	80.04		471.54
Harney Hotel	276.02					276.02
Kleaver's Store	192.76					192.76
Park Avenue Cleaners	1,640.51	1,974.84	1,414.54	2,109.03	2,750.60	9,889.52
Park Hotel	198.95	505.08	515.53	615.90	304.72	2,140.18
Paxton Hotel	151.70	121.27	125.48	145.55	142.77	686.77
J. C. Penney Stores	4,303.81	700.78				5,004.59
Right Way Cleaners	1,467.43	1,066.59	816.59	724.06	865.35	4,940.02
Sanford Hotel	1,460.48	2,011.33				3,471.81
Wellington Hotel	1,756.80	1,642.44	1,537.82	1,566.44	1,648.82	8,152.32
West Hotel	216.60	440.84	406.39			1,063.83
Y. M. C. A.	407.48	546.84	689.98	1,230.79	1,748.32	4,623.41
Regis Hotel		1,476.55	2,136.86	2,549.24	2,550.39	8,713.04
California Cleaners		1,008.78	1,319.05	1,192.33		3,520.16
Happy Hollow Club		87.37	281.81	325.30	88.46	782.94
Fifth Avenue Hotel		71.65	420.16	1.72		493.53

Name	1938	1939	1940	1941	Nov. 21 1942	Total for 5 yr. period
Congress Hotel	87.70	587.46	449.30	483.85	640.71	2,249.02
Frontier Laundry Supply	113.74	604.95	399.52	396.03	434.03	1,948.27
Ak-Sar-Ben	46.98					46.98
Benson High School			145.38	379.57	443.77	968.72
Best Cleaners			327.64	498.07	135.15	960.86
Central High School			111.27	288.07	638.68	1,038.02
Harley Hotel			142.25	374.93	376.59	893.77
Mi-Cleaners			562.46	5,076.54	5,979.19	11,618.19
Omaha Athletic Club			720.08	1,014.27	930.59	2,664.94
New Method Cleaners			354.75			354.75
Lee Hotel			31.37	650.64	663.14	1,345.15
Omaha University			132.54	385.12	420.43	938.09
Ideal Cleaners			19.54			19.54
Dowling Hall				2,223.22	3,675.43	5,898.65
Red Oak Cleaners				1,535.40	1,203.81	2,739.21
North High School				19.50		19.50
Lugsch Cleaners					1,453.91	1,453.91
Martin-Nebraska Co.					2,099.26	2,099.26
Winder Sales Co.					380.50	380.50
Pantorium Cleaners					221.03	221.03
Cooper Hotel					7.78	7.78
Hill Hotel					357.38	357.38
Rome Hotel					779.43	779.43
Totals	16,097.50	15,208.39	16,782.18	27,396.59	34,253.13	109,737.79

The foregoing amounts do not include linens which were charged under separate headings and listed on the grand totals elsewhere than on this statement. For example: The Omaha Athletic Club linen and bundle account for the year 1941 amounted to $5,823.82 and for the year 1942 up to Nov. 21st amounted to $4,804.09.

Certified as correct.

EARL H. MCDOUGAL, *Auditor*

Mr. Hotz: I recognize the fact that I am going a little [fol. 73] bit backwards in this case. I have to get something to go on to begin with. I have to have something to base it on.

The Court: I realize that, but on the other hand, don't get the Court confused, or jury either, because that will not help you. We have to keep these matters together. Fasten them together and they will be received on the question of volume only, conditionally that you explain them or break them down.

Q. Handing you Exhibit 13, Mr. Witness, I will ask you if that was made under your direction, or if you made it yourself from the books and records of the Kimball Laundry Company while you were there?

A. I made it myself.

Q. Just tell how that was made up and from what records?

A. That was made up from the general ledger that we carry. It carries from the year 1936 until 1942, November 21st. That is the amount of commissions paid and salaries paid to our route men.

Q. It has to do with the expense incidental to Exhibits 10, 11 and 12? A. That is correct.

Mr. Hotz: We offer in evidence Exhibit 13.

Mr. Murphy: If the Court please, it seems to me we are getting entirely away from the issue.

[fol. 74] The Court: Make your objection.

Mr. Murphy: We object to the offer of Exhibit 13 as being immaterial, incompetent and irrelevant, for the reason it is not evidence of the fair, market value or fair rental value, or of the capacity of the property taken.

The Court: That will be sustained.

Mr. Hotz: We offer to prove by the witness that which the exhibit contains and from the records, if necessary, in the courtroom.

Mr. Murphy: I am not familiar with that particular proof following the introduction of the exhibit. I object to the offer as incompetent.

The Court: It is not the proper procedure. You have offered the exhibit and that is your offer of proof. If

you have any other evidence, submit it and we will determine whether or not that will be received.

Mr. Hotz: The only purpose was that I didn't catch whether his objections covered competency and I didn't want to be ruled out on that exhibit on account of competency, because that can be substantiated.

The Court: The ruling is based on the proposition that the route was not taken, was not condemned, and is not involved in the suit.

[fol. 75] Kimball Laundry Exhibit No. 13, appearing in Vol. III, at page 1060.

[fol. 1060] D. Ex. 13 (Refused)

The Kimball Laudry Company maintained nineteen routes on November 21, 1942. Seventeen were residential or retail laundry routes, and two were wholesale. The drivers on the wholesale routes received no commission for customers obtained and retained. The seventeen retail route men were paid $25.00 per week plus a commission of ten per cent on all weekly business which they had built up or maintained above $200.00 per week.

The Commission Account following is for laundry trade acquired and held by these routemen over and above their fixed salaries for the years 1936 to November 21, 1942, inclusive.

COMMISSION ACCOUNT

Year		Commissions Paid	Total Salaries and Commissions Paid
1936		$ 8,041.79	$ 31,056.95
1937		9,751.23	32,298.06
1938		9,379.30	33,078.28
1939		9,604.42	32,030.36
1940		7,725.70	34,602.24
1941		10,221.59	39,345.59
1942	to 11/21/42	8,976.47	35,243.35
		$63,700.50	$237,654.83

Certified as correct
Earl H. MacDougal
Auditor.

Q. You were there at the Kimball Laundry on the 21st day of November, 1942, were you not?

A. That is right.

Q. And then you stayed right there at the Kimball Laundry during that time, did you not, in the same place?

A. I continued in charge of the office for the government.

Q. Under your direction and supervision were the volumes of the work that went through the army kept under your supervision? A. Yes, they were.

Q. And there were records kept of that by the Quartermaster Corps? A. Yes, sir.

Q. And has been right straight along? A. Yes.

Q. As to the amount of work that started in right at the beginning from army operations?

A. That is correct.

Mr. Hotz: That is all I want to know at this time.

Mr. Murphy: No cross-examination.

[fol. 76] Mr. H. F. Goodwin, produced as a witness on behalf of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name, please? A. H. F. Goodwin.

Q. What is your business?

A. Representative for the American Laundry Machinery Company, St. Louis, Missouri.

Q. Did you live here in the City of Omaha for a considerable length of time? A. Yes, from 1926 to 1933.

Q. In what capacity were you working during that period of time?

A. As a representative for the American Laundry Machinery Company.

Q. You now reside in St. Louis? A. That is correct.

Q. Are you acquainted with the Kimball Laundry Company? A. Yes, sir, I am.

Q. What is your business with the laundry machinery company? Just what was your job during this period of time? A. When I was in Omaha for all these years?

Q. Yes?

[fol. 77] A. As a representative and salesman for the American Laundry Machinery Company.

Q. What did that work entail?

A. That entailed selling equipment and installing equipment, figuring jobs, installations, and such as that, and maintenance of equipment.

Q. Did you have an occasion to go through the Kimball Laundry Company plant in November, 1942, which is about the time it was taken by the government? A. I did.

Q. Under whose direction and supervision did you go?

A. I can't recall the man's name, but he asked me to go through there, a one-armed man. I can't tell you his name.

Q. Mr. Sholes? A. Mr. Sholes, that was the man.

Q. For the government?

A. Yes.

Q. And you went through the plant at that time for what purpose? A. Appraising that equipment.

Q. And that equipment consisted of what?

A. The laundry machinery as manufactured by the American Laundry Machinery Company.

A. And other equipment that was in there as well?

[fol. 78] A. Not so much other equipment, because I was not so familiar with desks and things like that.

Q. I mean as far as laundry machinery?

A. Yes, sir, everything pertaining to laundry machinery.

Q. Everything pertaining to laundry machinery?

A. That is correct.

Q. Just how did you go about doing that job?

A. Well, we went through the plant, looked the machines over, machine by machine, and then I set up a value for Mr. Sholes, or gave him by word of mouth a value of the equipment, what it would cost to replace that equipment at the present time in machines of like amount in the same condition.

Q. In the same condition as you then found the machines? A. Yes.

Q. And you based the date, did you not, on November 21, 1942? A. Sometime in November.

Q. But the date you fixed was as of November 21, 1942?
A. Yes.
Q. And it was to find out what the value of the machinery and equipment was in the Kimball Laundry Company on that date?
[fol. 79] A. That is correct.
Q. That is right? A. That is right.
Q. Did you also have at your disposal the year in which the various machines were installed?
A. Yes, we did. We took those dates from their invoices.
Q. From the invoices of the Kimball Laundry Company? A. That is correct.
Q. You took the costs from their invoices?
A. The original costs.
Q. The whole business there consisted of some 594 items, did it not?
A. Something like that; five hundred and some odd number.
Q. On how many floors did you find the operating machinery of the Kimball Laundry Company?
A. I think it was on four.
Q. Four floors that were machinery and the ground floor was used for what? A. Garages and boiler room.
Q. And the offices in the front? A. Yes.
Q. Did you, at the time, make up notations in writing as to your conclusions?
[fol. 80] A. Yes, sir.
Q. Do you have those notations with you? A. Yes, sir.
Q. In your pocket? A. Yes, sir.
Q. Those were the originals you made at the time?
A. That is correct.
Q. I am going to hand you Exhibit 21, and ask you to state whether or not columns one and two of Exhibit 21 reflect the figures and the appraisals that you made on November 21, 1942?
A. These columns one and two are identical with mine.
Q. The one you have in your hand is your original notes? A. Yes.

Q. And you checked that before coming into the courtroom and know that to be true? A. Yes, sir.

Q. Will you tell us from your examination what was the fair market value, as you found it, of the machinery and equipment of the Kimball Laundry Company on November 21, 1942?

Mr. Murphy: To which petitioner objects as incompetent and immaterial and no proper and sufficient foundation being laid and calling for hearsay testimony. I want [fol. 81] to be fair to the Court and counsel. I have witnesses that have about the same foundation and I just want to be sure that we proceed equally on both sides of the case.

The Court: I take it you are not objecting to the qualifications of this man. You can lay a better foundation by showing the years of his employment and his experience.

Mr. Murphy: Not as to his qualifications; as to the hearsay and taking of the figures from the other books and records that are not offered. He says he got the list and has it properly prepared and seems to know what he is talking about. The point I have is, as the witness has stated, the values as put down there, as I understood him to say, prices and so forth, are taken from the books of his company.

The Court: No, he said from the invoices.

Mr. Hotz: From the invoices of the Kimball Laundry Company.

The Court: Original invoices, I understood him to testify. Overruled.

Mr. Murphy: May I ask one or two questions?

The Court: Yes.

Mr. Murphy: Q. What do you understand or include [fol. 82] under the terms "machinery and equipment," Mr. Goodwin?

A. The machinery and equipment is the value of the equipment, the original purchase price, plus—

Mr. Murphy: Q. You misunderstand me. I just want to be sure we don't have duplications and eliminations.

Are you including, for instance, power plant machinery and equipment? A. No, sir.

Mr. Murphy: Are you referring solely to the laundry machinery and equipment? A. That is correct.

Mr. Murphy: Q. Are you including all of that, or only that portion that was originally purchased from your employer, the American Laundry and Machinery Company?

A. The equipment that was originally purchased from the American Laundry Company.

Mr. Murphy: Q. So, what you are talking about now is the laundry machinery purchased from the American Laundry Machinery Company? A. Yes.

The Court: Did you observe any other down there?

A. The other equipment, understand, was the installation of the pipes and such as that, is included in my figures, freights and things like that, figuring freights from [fol. 83] weights and cartages, and installing these machines complete, ready for operation.

Mr. Murphy: Q. I think there is also power plant machinery and equipment.

A. I have nothing to do with boilers.

Q. That doesn't appear on the exhibit? A. No, sir.

Mr. Murphy: Q. There is also other cleaning equipment?

A. We manufacture cleaning equipment, too.

Mr. Murphy: Q. When you were down there at the laundry in November, 1942, didn't they have machinery and equipment, and I am referring now to laundry and cleaning equipment, at least some items purchased from other companies and not yours? A. Yes.

Mr. Murphy: Q. As I understand it, those items are not included in your list?

A. Some of those items are if it pertains to dry cleaning equipment. I am qualified to pass on one of my machines or my competitor's machines.

Mr. Murphy: Q. I am not testing your qualifications. I want to be sure we know what part of the plant we are talking about. You eliminate power equipment and some other laundry equipment?

A. All of the equipment used ir the process of the [fol. 84] dry cleaning and laundry work.

Mr. Murphy: May I look at your list a minute?

Q. The exhibit you have in your hand, Exhibit 21, contains all of the contents of the Kimball Laundry Company, does it not, as you found it on or about November 21, 1942? A. That is correct.

Q. Excepting the mechanical equipment, the power plant and matters of that sort? A. That is right.

Q. Everything that pertains to the laundry and dry cleaning equipment, with machines and all that, including some equipment on the first page or so there of things like adding machines and typewriters, and so forth?

A. That is correct.

Q. How were those valuations made up?

A. I was not qualified to do that and I had to ask Mr. Jacobberger, and I don't know whether Mr. A. L. or Mr. Harry, and we tabulated those figures, which are included in my total figures.

Q. Is it Mr. Sholes' report, too? A. Yes, sir.

Q. And they are only very small items there in the office? A. Yes, sir.

[fol. 85] Mr. Hotz: Concerning which I don't think there is any dispute.

Q. When he talks about other laundry equipment, suppose you would find there a piece of laundry equipment made up from some other laundry manufacturinng concern and it was installed there—did you make your appraisal of that machine? A. Yes, I did.

Q. Upon what did you base your conclusions, your knowledge of that machine?

A. We, as a manufacturer, know the other fellow's equipment and carry the prices and know what they are.

Q. All of them? A. Yes, that is right.

Q. Tell us, then, the value of the equipment set forth on Exhibit 21, as you found it on November 21, 1942, as a fair market value of that equipment installed on that date? What is the total? A. $273,831.39.

Q. And that has a cost which you found from the invoice? A. $336,—

Mr. Murphy: Wait. Move to strike the answer as voluntary before I had the chance to object.

The Court: Sustained.

Mr. Murphy: Object to this question now as incompe-
[fol. 86] tent and immaterial, the witness having testified to the value at the time of taking. The cost at a remote and fixed date is immaterial and no foundation laid for it.

Mr. Hotz: The dates are on there.

The Court: To establish the value of the machinery in the building, the total of the value. From that there is some evidence of what the rental value that we are trying to determine would be. We have a valuation of 273 plus.

Mr. Hotz: The cost, while it may not be a controling factor, it seems to me to be a necessary thing to show the more or less accuracy of that.

The Court: You establish the valve, and I take it, that being so, you had better stay pretty close to the Nebraska rule that cost is not evidence. There is no occasion for stretching it beyond the value you have now established.

Q. In the third column of the exhibit is the value of the same equipment as of November of 1945. You had nothing to do with that, did you? A. No, I did not.

Mr. Hotz: That is all as far as this witness is concerned. We have another witness for that.

The Court: Turn him over to counsel on the other
[fol. 87] side for cross-examination.

Mr. Hotz: I will reserve offering that exhibit until I have that column identified.

Cross-Examination of H. F. Goodwin by Mr. Murphy:

Q. When you made this inspection and survey and appraisal in November, 1942, or thereabouts, did I understand you to say you did that in company with Mr. Lewis Sholes? A. That is correct.

Q. Both of you took and relied upon the statements of Mr. Jacobberger as to the values of some of the office machinery? A. That is correct.

Q. And you and Mr. Sholes made the survey together?

A. No, sir. Mr. Sholes made the survey on the desks; we went together and he put the price down. I don't recall what the prices were until I refer to them here.

Q. You were with him at that time? A. Yes.

Q. And you furnished to him prices on machinery?

A. Verbally.

Q. But the prices you furnished him were exactly as here? A. That is correct.

Q. And they were prices you used in this survey you made? A. That is correct.

(Witness excused.)

[fol. 88] Mr. W. G. Kinder, produced as a witness on behalf of the Kimball Laundry Company, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. Please state your name? A. W. G. Kinder.

Q. What is your business?

A. I am a representative of the American Laundry Machinery Company in Nebraska and Iowa.

Q. Where are your headquarters? A. Omaha.

Q. Do you live here?

A. Yes, sir, at 105 Rockbrook Road.

Q. How long have you lived here?

A. Since September, 1943.

Q. What is your work? Just what does your work entail?

A. The sales of laundry machinery, which involves a lot of analysis work in case of a projected sale, taking in certain used machinery in trade, and things of that sort. Everything in connection with the sale of laundry machinery.

Q. Both new and second-hand? A. Yes, sir.

Q. Did you have occasion to evaluate machinery that was installed such as you find in the Kimball Laundry [fol. 89] plant, for example? A. Yes, sir.

Q. Have you done that for others? A. Yes.

Q. Who are some you have done it for?

A. I was with the government for a time in Dayton, Ohio, as a representative of the air corps. I was attached

to the Frigidaire Corporation. They were putting in a laundry and they asked me to assist them in appraising some machinery they had an opportunity to buy, and later did buy on my recommendation. I have also had occasion to appraise laundry machinery on many different occasions in connection with fire losses, insurance adjustment claims, and things of that sort.

Q. Are you familiar with the value of the machinery and equipment in the Kimball Laundry Company? Do you know that plant? A. I feel I would be, yes, sir.

Q. Have you been in and out of it a number of times?

A. Yes, sir.

Q. Were you requested by the Kimball Laundry Company to make an appraisal and evaluation of the machinery and equipment in that laundry as it was in November, 1945, just near the close of last year?

[fol. 90] A. Yes, sir.

Q. In that regard, did you go through the plant and look at each piece of machinery and so forth throughout the plant? A. Yes.

Q. Did you have a list to go by?

A. A list of the machines?

Q. Yes. A. Yes, sir.

Q. Did you take in all the machines that were in the plant?

A. Every single machine that was covered by the list that I had.

Q. It was subsequently put into writing? A. Yes, sir.

Q. Is that Exhibit 21, and were the valuations on the right-hand column made by you? A. Yes, sir.

Q. I am not going to introduce these in evidence, but I want you to give us an idea of how you went about it?

A. I went up to each machine, accompanied by a mechanic who was quite familiar with that type of machine.

Q. He was not identified with the Kimball Laundry Company?

A. No, sir, he was a laundry machinery mechanic [fol. 91] and engineer, and we determined what was wrong with each machine, or what would be necessary to bring that machine up to a reasonably good working

condition, one that theoretically you could sell the machine off the floor to another laundry. We attached to that machine the market price of such a machine at that particular time, subtracted from it the cost of putting it in salable condition, and then added to the valuation the freight and cartage and cost of installation if the machine was connected and had not been disconnected from its original position. If it was disconnected and had to be moved to put it in its original position, for instance, we subtracted the cost of the connections, but added the cost of freight and cartage.

Q. Did you find, in going over the list as you went along, that there were a number of machines that were on the list that was prepared by Mr. Goodwin that were not there at all?

A. Some of the machinery had been removed to Fort Omaha; some of it had been removed to storage on the fifth floor; and some of it was missing altogether.

Q. Some of it was missing altogether? A. Yes.

Q. Wherever you could find the machine to appraise it, did you appraise it?

[fol. 92]. A. Yes.

Q. And where you did not find the machine, you left it blank? A. Yes.

Q. And that shows on your Exhibit 21 in Column Number 3? A. Yes, sir.

Q. What did you find to be the fair market value of such machinery and equiment as you found there in November of 1945, the sum total as found on page 23?

A. 120—

Mr. Hotz: Wait a minute. He wants to object.

Mr. Murphy: Objected to as incompetent and immaterial in view of the fact that it is an incomplete list and there is no showing what other items—

Mr. Hotz: If it wasn't there he couldn't appraise it.

The Court: Overruled. He may answer.

A. $120,699.75.

Q. I notice that on page one of the exhibit that where it came to difference in office furniture and equipment, like desks and things of that sort, you didn't make any

change; you put in the same values you found on Mr. Goodwin's list in 1942, is that right?

Mr. Murphy: Just a moment. Object to that as leading and suggestive.

[fol. 93] The Court: It speaks for itself, does it not?

Mr. Hotz: Yes, it does.

The Court: Why do you need to prove it by the witness?

Mr. Hotz: I will withdraw that.

Cross-Examination of W. G. Kinder by Mr. Murphy:

Q. Referring to the first page of the exhibit, items listed there are for the most part office furniture; are they not? A. Yes, sir.

Q. Where did you get your valuations for those items?

A. I did not get them. I did not change them, roughly speaking, at all. The second column shows the value that had been attached to them in November, 1942, and with few exceptions, I made no changes on that.

Q. Where you did make some changes, where did you get them?

A. I looked at the machine, accepted the valuation that had been attached to it in column 2, and depreciated it on the basis of what had happened to it in the meantime.

Q. Had you seen it in 1942? A. No, sir.

Q. Had you seen it any time prior to November, 1945?

A. No.

Q. So, you don't know what happened to it in the meantime?

[fol. 94] A. I only know the condition it was in when I saw it.

Q. There are, I think you stated, a number of items, a quite large number of items opposite which you have set no figure in the third column, or the column to the right? A. Yes, sir.

Q. Did I correctly understand that you simply eliminated those items and they are not included in your computation in the amount of $120,000.00?

A. I couldn't find them.

Q. They were in town?

A. I don't know. All I can tell you is what was there.

Q. All you included in arriving at your $120,000.00 figure are the machines that were there?

A. The things I could find, yes, sir.

Q. You didn't go out to Fort Omaha to see if they were out there?

A. I spent an entire day. Much of this machinery covered in column three was in Fort Omaha in a heap in the corner.

Q. But you didn't go out and check it?

A. Oh, yes, I did.

Q. Have you listed it on here?

A. Yes, it is all included in here.

[fol. 95] Q. Where is the rest of the machinery that isn't included in here? A. I am sure I don't know.

Q. For instance, referring to page 15, about the eighth item up from the bottom, there is an item there, a Wallace Tierman Bleacher Unit, that was valued at $1,125.00 in 1942. You have no valuation at all.

A. May I ask the number again, item number at the left-hand side?

Q. 368. Pardon me, I did not notice it.

A. I did not find it anywhere. I don't know what happened to it.

Q. Anyway, if that machine were there, then of course there is more than $120,000.00 of machinery on hand?

A. Well, that depends on where "hand" is. I don't know that. I only know what was there, what I was able to find.

Q. I think we are clear on that. All that is included in your $120,000.00 is what you found? A. Yes, sir.

Q. And there were a considerable number of other items that are not here and not included in the $120,000.00?

A. They were not where I was able to find them.

Q. I am not asking that. I am asking you if they were included in the $120,000.00?

[fol. 96] A. If I couldn't find them they were not.

Q. You were with the American Laundry Machinery Company? A. Yes, sir.

Q. When did you make this survey?

A. November, 1945.

Q. And you sell American Laundry Machinery Company machinery and equipment?

A. Yes, sir, and others as well, at times.

Q. Have you sold any to replace these items down to the Kimball Laundry? A. No, I haven't.

Mr. Hotz: We offer in evidence Exhibit 21, and of course, I realize the fact that one column has cost in it, but I don't think that ought to destroy the exhibit.

Mr. Murphy: I feel it should. I object to the exhibit for the reason, as offered, the first column of items is comprised entirely of cost items which are entirely immaterial at this stage of the record in view of the evidence of the value.

The Court: I think I will let the matter stand and instruct the jury to disregard the first column. That is the cost item. It is not proper for us to consider that. The exhibit is received merely to show the appraisal [fol. 97] that was made at the time the property was taken on the 21st of November, 1942, and again the appraisal that was made after it had been used and what was in the building in November of 1945. The cost of the machinery is not material. That is no element here, and it is not necessary to consider it in order to arrive at the proper valuation of the property at the time it was taken. Keep in mind that the exhibit I have referred to in this special instruction is Exhibit 21, the list of the machinery or equipment in the building that was appraised by these two experts.

Kimball Laundry Exhibit No. 21, appearing in Vol. III, at Page 1066.

(Witness excused.)

[fol. 1066-1 to 23] EX. 21 except first column (Received)

[fol. 1066] D. EX. 21-a (Received)

Exhibit 21(a): Tabulation taken from Ex. 21, items not shown in column 3, that are either of no value or have been destroyed, $11,492.31.

[fol. 1066] D. EX. 21, p. 1

FIRST FLOOR—SUPPLY ROOM

No.	Year	Nomenclature	Cost Installed	Value Installed Nov 21-42	Value Installed Nov. 1945
1		Counter - Zinc - Top—L. 21 6″x4′32″ Ht. 6 Drawers - W. 32″ Ht. 18″	$ 94.00	$ 80.00	$ 80.00
2		Shelving above to Ceiling - 2x2 frame 36″ cc 17′ Ht. 17″ Deep - 7 Tiers Shelves	56.00	50.00	50.00
3		Mildrandt Ladder - 12′8″x17″ with Track 12′8″ above floor	35.00	25.00	25.00
4		Shelving 2″x2″ Frame - W. 10′ Ht. 9′9″ - 5 Shelves 24″ - 5 Drawers below	50.00	40.00	40.00
5		Open Padding Roll - Cabinet W. 7′ Ht. 8′ D. 36″ Solid back and sides	40.00	30.00	30.00
6		Shelving 2″x4″ frame - W. 9′ Ht. 6′6″ D. 39″ 4 Shelf	27.00	25.00	25.00
7		Shelving 2″x4″ frame - W. 6′ Ht. 6′6″ D. 24″ 4 Shelf	12.00	10.00	10.00
8		Cupboard Beaded Ceiling - W. W. 5′7″ Ht. 6′2″ D. 36″ 5 Shelf 2 Door	47.00	28.00	28.00
9		Counter - Mill Constructed - L. 10′6″ D. 32″ Ht. 30″ 4 Drawers - Shelves above - L. 8′ D. 24″ Ht. 42″	70.00	49.00	49.00
10		Flat Top Oak Desk - 32″x52″	45.00	15.00	15.00
11		Table - 39″x8′8″ - Linoleum Top	27.50	25.00	25.00
12	1940	Addressograph - Model 1700 B 298321 120 Plate Drawers	561.88	490.00	490.00
13		Flat Top Desk - 27″x36″	25.00	15.00	15.00
14	1941	Multilith Duplicator	418.70	377.00	100.00
15	1939	Graphotype and Stand	105.00	75.00	75.00
16		Balcony and Racks	400.00	300.00	200.00

PANEL ROOM

17	Panel Room Cupboard - Beaded Ceiling L. 16' Ht. 6'6" D. 24" - 6 Compartments - Shelves and Bins - 6 Door Padlocks	103.00	50.00	50.00
18	Cupboard Beaded Ceiling - W. 39" D. 22" Ht. 47"	17.50	12.50	12.50

[fol. 1066] D. EX. 21

Exhibit 21: Pages 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 are itemized statements of the machinery and equipment throughout the building, showing witness's appraisal of the cost when installed, value installed November 21, 1942, and value installed November 1945. Page 23, being a tabulation of all the pages of the exhibit, shall be printed in full.

[fol. 1066] D. EX. 21, p. 23

LUNCH ROOM—FIFTH FLOOR

No.	Year	Nomenclature	Cost Installed	Value Installed Nov. 21-42	Value Installed Nov. 1945
566		4 Tables - 2'6"x14	$ 104.00	$ 85.00	$ 85.00
567		23 Folding Chairs	46.00	46.00	20.00
568		24 Kitchen Chairs	30.00	30.00	24.00
569		20 Cafeteria Arm Table Chairs	100.00	100.00	40.00
570		Cupboard and Work Table	81.00	40.00	40.00
571		Lunch Counter Steam Table and Show Case	196.50	100.00	
572		Sanitary Coil Drinking Fountain	61.00	40.00	20.00
573		Reliable Gas Stove	187.50	75.00	25.00
574		Coffee Table - 30"x36"	30.00	20.00	
575		Hall Shaw Co. Vaculator 4 burner Gas Plate	20.00	15.00	15.00
576		Frigidaire Electric Refrigerator	430.00	215.00	
577		Table - 26"x26"	8.00	6.00	6.00
578		Table - 30"x48"	13.00	12.00	12.00
		MISCELLANEOUS ITEMS—FIFTH FLOOR			
579		2 Pipe Sack Racks	15.00	15.00	
580		14 Wood Curtain Racks - L. 6' H. 5'	140.00	120.00	70.00
581		6 Pipe Racks - L. 7' H. 6'	90.00	75.00	
582		1 Pipe Rack - L. 8' H. 6'	15.00	12.00	
583		1 Pipe Rack - 12x5	20.00	20.00	
584		Electric Wall Clock - 12"	27.50	20.00	20.00
585		Electric Fan - 18"	45.00	25.00	25.00
586		2 Electric Fans - 12"	55.00	40.00	40.00
587	1938	"Health Mor" Vacuum Cleaner	75.00	50.00	
588		3 Steel Lockers - 12"x18"x6'	19.95	15.00	15.00
589		1 Iron Stool	4.50	3.50	
590		2 Steel Bag Trucks	48.00	33.60	
591		9 #6 Bag Trucks	151.02	105.71	
592		3 #4 Drag Baskets	25,44	15.26	
593		1 #6 Drag Basket	9.94	6.40	
594		1 Steel Body Truck	75.00	60.00	20.00
			$336,976.09	$273,831.39	$120,699.75

Difference $153,131.54

(Witness excused.)

[fol. 97½] Mr. Hotz: In reference to Defendant's Exhibit 19, of John Latenser & Sons, by John Latenser, Jr., Mr. Latenser was here and left the courtroom for an appointment, which he can not give up this afternoon, but will be here in the morning, so I have asked counsel on the other side if they would agree that if he were present he would identify this exhibit as having been made by himself and that he would testify to what is stated on that exhibit, as the architect who had charge of the construction of the building in 1925, and the addition in 1935, and its estimated reproduction cost in November of 1942.

Mr. Murphy: If the Court please, reserving fully our rights to object to the exhibit, we are perfectly willing to stipulate that if Mr. Latenser were present he would testify that he compiled this from the records stated on the exhibit.

The Court: That that was his appraisal or judgment, if he would testify.

Mr. Murphy: These are book values.

Mr. Hotz: Not altogether.

Mr. Murphy: Yes, they are.

Mr. Hotz: In column two. We offer in evidence Exhibit 19.

Mr. Murphy: Petitioner makes no objection on the [fol. 98] ground of foundation, but does object to the exhibit as incompetent and immaterial and too remote; more specifically as to column one, being item of cost way back in 1925, and object to it as being too remote; the same objection as to the second column, 1935; further as not being the best evidence, it being, I think, a fair assumption that it is easily possible to produce witnesses as to the present actual value without that item.

The Court: I understand that is what he would testify to.

Mr. Murphy: These values in 1925 and 1935, columns one and two?

The Court: That is what he would testify to if he were here.

Mr. Murphy: That he would identify the exhibit.

The Court: The exhibit is not going to help us. You gentlemen have agreed if Mr. Latenser were here he would testify that the items shown in all these columns are accurate and correct and represent his appraisal as shown by their purport. I assume that is what you agreed.

Mr. Murphy: No.

The Court: You had better bring Mr. Latenser in.

Mr. Murphy: I have just had the Reporter read a [fol. 99] little of the record back to me and I didn't mean to require counsel to have Mr. Latenser here, and I would like to start all over again and merely object to this exhibit.

The Court: Let us make the record. Withdraw your former objection and interpose this objection in lieu thereof.

Mr. Murphy: Yes, Your Honor. Petitioner objects to the matter shown in the first column of figures under the heading "1925," as being too remote in point of time, and to the figures in the second column under the heading "1935," for the same reason, as being too remote in point of time, and as to both of those columns as being immaterial, being cost items; and we object to the figures in the third column under the heading "1942," for the reason that the total figure at the bottom of that column reflects, as it states in the exhibit a reproduction cost, which is a new building cost in 1942, and does not take into consideration depreciation over the period that the building was in existence.

The Court: As to the remoteness of the cost, let me reiterate what I said at the beginning. In an ordinary case your objection would be good, but this seems to be [fol. 100] a different kind of a case. In a sense we are plowing new ground, trying to arrive at a reasonable basis to afford the plaintiff in this case, or the owners,

just compensation to which they are entitled under the constitution, and we can only work with the material that we have at hand. For that reason I think we should deviate from the Nebraska rule. This is a federal court, a federal jurisidction, and governed by Federal Acts, and that is controlling over the Nebraska rule. As to your objection to the third item, it being a reproduction cost, that is some evidence that might be used as a foundation stone to arrive at the fair market value of the property at the time it was taken, and with that as a key stone, we could then ascertain what the fair, reasonable rental value of that property would be. For the reasons stated your objections are overruled.

Kimball Laundry Exhibit No. 19, appearing in Vol. III, at page 1065.

[fol. 1065] D. EX. 19 (Received)

Construction Cost and Estimated Reproduction Cost as of 1942 (November 21)

Kimball Laundry Building, Omaha, Nebraska

October 29, 1943

	1925	1935	1942
General Construction			
Peter Kiewit Sons' Co.	$148,437.40		
Concrete Engineering Co.	13,418.00		
Busk Construction Co.		$ 22,365.51	
International Steel Co.		5,015.50	
Estimated			$221,220.00
Heating & Plumbing			
J. J. Hanigher Co.	15,134.26	2,386.55	
Estimated			25,287.00
Electrical Work	$10,266.20	*1,125.00	
Estimated			13,718.00
Otis Elevator Co.	4,000.00	1,095.00	
Estimated			6,878.00
Architect's Fee	8,690.09	1,369.00	
Estimated			13,245.00
	$199,945.95	33,356.56	
		199,945.95	
Construction Costs in 1925 (Col. 1) and 1935 (Col. 2)		$233,302.51	
Reproduction Cost of Same in 1942 (November 21)			$280,348.00

*Estim ted; records not available

JOHN LATENSER & SONS, *Architects*
By JOHN LATENSER

[fol. 101] MR. A. L. JACOBBERGER, produced as a witness on behalf of the Kimball Laundry Company, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name? A. A. L. Jacobberger.

Q. Where do you reside? A. Omaha.

Q. And have for how long? A. Forty-five years.

Q. How old are you? A. Forty-five.

Q. Where do you reside?

A. At the home address, 848 Fair Acres Road.

Q. What is your connection with the Kimball Laundry Company? A. As secretary and operations manager.

Q. Of the Kimball Laundry Company?

A. Of the Kimball Laundry Company.

Q. How long have you been identified with the laundry, actually working down there in the laundry?

A. Since 1918.

Q. Where were you located at that time in 1918?

A. Our plant was then located on, I think it was 1511 Jackson Street, a block north of our present location.

[fol. 102] Q. Then where did you move to?

A. We moved into our new plant at 15th and Jones Streets, in November of 1924.

Q. The new plant was built then? A. Yes, completed.

Q. How many stories was it?

A. It was four stories then.

Q. That is all that there was—another story was added in 1935? A. Yes.

Q. Why was that story added?

A. To provide room there for our expansion and growth.

Q. When you started out there in the new plant, how many departments were there to your business, the laundry business?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial, and too remote in point of time.

Mr. Hotz: It is a general question.

The Court: It is leading up, I take it, to something else. Go ahead and answer.

The Witness: Will you repeat the question?

The Court: How many departments did you have?

[fol. 103] A. We were then only engaged in direct laundry work.

Q. You added, did you not, the dry cleaning establishment? A. Not at that time.

Q. When? A. In 1932.

Q. Did that require the installation of other machinery and equipment? A. Yes, sir.

Q. You continued the dry cleaning, along with the laundry business, right up until November 21, 1942?

A. We did.

Q. What happened on November 21, 1942, or rather November 22? A. Well, we were put out of business.

Q. By what proceedings?

A. By condemnation proceedings.

Q. That is the case that is here on trial?

A. Yes, sir.

Q. Were you running full blast and going ahead on November 21, 1942? A. We were.

Q. What happened then on the morning of the 22nd? Who came in? What department of the government?

A. The army, a representative of the army, the Seventh Service Command.

[fol. 104] Q. How many employees did you have at that time? A. 185 employees.

Q. Were you one of such employees?

A. Yes, I might have been 186th.

Q. Did you stay with the government? A. I did.

Q. In what capacity?

A. As superintendent of the plant.

Q. And you have continued in that capacity?

A. Yes, sir.

Q. Right straight through?

A. Yes, and at the present time.

Q. So far as the employees were concerned, did they all stay at the beginning?

A. All but a very few; I would say 95% of them.

Q. Then, later on, what became of the employees?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: That will be sustained.

Q. Did the government supply help of its own after that?

Mr. Murphy: Same objection.

The Court: The government has been operating it and can only operate it with men.

[fol. 105] Mr. Hotz: I want to show the style and kind of some of them.

The Court: Overruled.

Q. What have you been operating with recently in the last year or two?

A. The government supplemented additional employees for a while. When the employment situation became bad we were unable to get civilians. They supplemented with prisoners of war.

Q. How many prisoners of war were down there?

A. A maximum of one hundred.

Q. Did any of these men have experience in the operation of laundry machinery and equipment?

A. No.

Mr. Murphy: Objected to as calling for a conclusion of the witness.

The Court: Objection overruled.

Q. Did you have supervision of them? A. I did.

Q. Did you have supervision of the operation of the entire plant; I mean from the operation standpoint?

A. From the quartermaster operation. There was a division between the quartermaster and engineers. I had no supervision over the engineering.

Q. What do you mean by that?

[fol. 106] A. I mean by that, operations of the power plant and maintenance and repairs of any parts connected therewith.

Q. For the purpose of showing the use that the government put the plant to, that is, the machinery and

equipment, in order to help us arrive at the understanding of what its depreciated value is, you might tell us just how the operations of the government started right at the very beginning, as to the manner in which the machines were used, how they were kept up, and things of that sort, generally—your own personal observation?

A. It was necessary, in order to conform with the operations we had to conform with under government supervision, to change the entire lay-out of the machinery and equipment in the plant, in order that we might be able to produce the volume of business and the kind that the government required the plant for. We had to move machines, take them out, machines that we had for special uses and private operations that would not apply in their method of operations. Those were removed and others were moved in their places. It required changing over the entire floor plan lay-out, with the exception of the wash room, and some parts that had been changed [fol. 107] to conform to the production that was necessary under government operation.

Q. How many hours a day were those machines in use by the Kimball Laundry, ordinarily?

A. Nine hours a day under Kimball Laundry Company.

Q. And how many under the army operations?

A. For the most part, sixteen hours, and sometimes longer.

Q. Do the machines necessary in the operation of that business have a capacity and limit to the capacity stated on them? A. They all have a limited capacity.

Q. Were those rules observed? A. No, sir.

Q. What were the facts in reference to that?

A. Because of the necessity of performing this huge volume of work, getting it out and giving service to the enlisted men, the hospitals, mess halls, and some fifteen air bases that we served, it was necessary to over-load the capacity of our machines in order to produce that work and give service.

Q. And that went on during what years?

A. 1943 and 1944 and part of 1945.

Q. What was the effect of that on the machines and plant engine?

[fol. 108] A. It had a very destructive effect on the machinery.

Q. What about the power plant? What was its effect on the power plant?

A. Likewise. For instance, to give the best explanation of it, we had two boilers which have rated capacities to produce so many pounds of steam or horsepower per hour and it was necessary to pull them way beyond their reasonable rated capacity, over-load them, in other words.

Q. What was the result?

A. The result was that the boilers were very vastly deteriorated and the stress and strain on the metal and tubes and the moving equipment in connection with them was in many cases destroyed.

Q. What is the condition of one of them now?

A. One boiler is completely out of service—was rather. They are using it in part, now, but for all purposes and uses for the operation of a laundry, it can no longer be used for that.

Q. How about the other one?

A. The other one is still in operation and undoubtedly needs considerable repairs and replacement of parts.

Q. As far as this power equipment is concerned in that building, just what does it include that is not in-

[fol. 109] cluded in Mr. Latenser's exhibit, as to the building, and Mr. Goodwin's and Mr. Kinder's exhibit in connection with the laundry machinery and equipment? What else is there in that building, valued, that has not been testified to so far as the physical equipment is concerned?

A. There is the item we use called power equipment, which includes the boilers. I can't give you all of them, but I will just give you—boilers, water softeners, heat reclaimers, hot water heaters, air compressors, pumps, steam water pumps. There are instruments of steam flow meters and draft indicators. There is the forced draft installation, which is used in operation of the boiler. There are stokers that feed the coal into the boiler, ash

hoppers, hot and cold water tanks and equipment in connection with the water softener, known as salt reclaimers and brine circulating system. There is an item called a K. V. A. capacitator. That is an electrical installation that maintains a fairly even flow of the kilowatts consumed, and I believe I have given the air compressor before.

Q. Do you have in your hand an exhibit that you made up yourself? A. Yes, sir.

[fol. 110] Are you familiar with the values of the equipment shown on that exhibit on November 21, 1942, which you have styled power equipment? A. I am.

Q. How did you become acquainted with such valuations?

A. Well, most of them I assisted in the purchase of them. I knew what they cost and I knew what the replacement cost would be at that time by consulting with men who sold, manufactured and installed.

Q. What would you say was the fair and reasonable market value of the power equipment in the Kimball Laundry Company as you found it on November 21, 1942?

Mr. Murphy: Objected to as incompetent and immaterial; no proper and sufficient foundation laid; this witness not shown qualified to answer.

The Court: This witness is one of the owners. He is testifying in behalf of the owners of the property. The man or woman who owns property can always testify to its value without any foundation. He is always presumed to know the value of that which he owns. The fact that the Kimball Laundry Company is a corporation does not change the rule. Whether he is testifying as an officer of the corporation or whether he is testifying as one of the owners of the corporation, the rule should [fol. 111] be, and I think, is the same. Objection overruled.

Q. On the right-hand side of that exhibit, I neglected to ask the witness what is on the right-hand side, as to the value of that same property in March, 1946, if you know? A. Yes, I do know.

Q. What do you find the value of those same items to be in March, 1946, at this time?

A. You want the figures on it from the exhibit?

Q. Yes.

A. I haven't given the figures in the left-hand column yet.

Q. What is the total in the left-hand column?

A. The total value for 1942 of that equipment, known as power equipment, was $62,928.08, and in the right-hand column, I value that equipment, after it has been used these three years and four months, practically, at $35,260.53.

Q. I notice there is a 225 horsepower boiler on which you say "damaged beyond use." It had a valuation on November 21, 1942, of $8,921.25. Was that one of the items you stated was destroyed?

A. That is one of the items I stated was destroyed for any further use so far as the laundry business is concerned.

[fol. 112] Q. And the heat reclaimer was $4,800.00 in 1942? A. That is right.

Q. And the other is the hot water heater? A. Yes, sir.

Q. And the rest of the items as shown on that exhibit are the damages as itemized and shown, is that right?

A. Yes.

Q. Down at the bottom you have an item of $5,000.00, I don't understand. Just what is that?

A. That $5,000.00 may or may not cover the expense of removing the old boiler—we have to take out walls of the building to take out the old boiler and replace a new one—I should say, for the hooking up of pipes in connection with the changes made necessary by the destruction of this boiler. Likewise, does it include taking out and replacing—I am talking now about the cost of labor of doing it and tearing out walls and making connections, not the cost of the machine—for the heat reclaimer and hot water heater, and also for replacing in its proper position, and of the right kind of boiler blow down well. That is a tank that is sunk in the floor of the boiler room and which is used in connection with blowing down

[fol. 113] boilers to reduce the concentrates. That is done one or twice a day as necessary. During the course of the government's operation that was destroyed; as a matter of fact, blown clear out of the floor. They have since replaced one, which is inadequate, and it is in the wrong position in the boiler room. Likewise, in the matter of this one boiler that was destroyed for use in carrying the required amount of pressure, they had to make some changes on what we call the main steam header, a header or pipe eight or ten inches in diameter, in which the steam flows out of the boiler into this header before it goes into the plant proper for distribution to the various machines. That has also been seriously damaged and will have to be replaced, and so that $5,000.00 is additional expense that will be involved in the items I have just given you.

Mr. Hotz: We offer in evidence Exhibit 23.

Mr. Murphy: No objection.

Kimball Laundry Exhibit No. 23, appearing in Vol. III, at page 1068.

[fol. 1068] D. EX. 23 (Received)

Value of Items of Power Equipment or Power Machinery Which are Specifically Adapted for the Operations of the Kimball Laundry Company as a Laundry and Dry Cleaning Establishment.

By A. L. Jacobberger

	Value November 21, 1942	Value March, 1946
225 H. P. Boiler	$ 8,921.25	Damaged beyond use
300 H. P. Boiler	12,145.00	$10,000.00
Draft Indicator	25.00	25.00
Steam Flow Meter	369.98	200.00
Forced Draft Installation	1,184.21	984.21
Ash Hopper	621.00	100.00
Two Stoker Installations	2,940.32	2,000.00
Heat Reclaimer	$4,800.00	Damaged beyond use

Cold Water Tank 10,000 gal. cap.	500.00	500.00
Hot Water Tank 10,000 gal. cap.	732.32	632.32
Hot Water Heater	5,500.00	Damaged beyond use
Three 108" diam. Water Softeners	18,500.00	16,000.00
Salt Reclaimer	770.00	700.00
Brine Circulating System	500.00	450.00
Two American Marsh Steam Pumps	700.00	300.00
Boiler Blower Fan	315.00	265.00
K. V. A. Capacitor	1,764.00	1,764.00
Air Compressor Installation	2,640.00	1,440.00
	$62,928.08	$35,260.53
Less expense to remove and replace one boiler, heat reclaimer, 3,000 gal. hot water heater, and replace the boiler "blow down well" that was destroyed in the government operations; also damages to the main steam header because of temporary changes made necessary when the one boiler was rendered unserviceable.		5,000.00
		$30,260.53

The Court: The court and jury have not seen the place and have not a picture in their minds. I have specifically instructed them they must not go down there and look at it. Can you not give us a picture so that we can see the [fol. 114] building in our imagination, as it was on the 22nd day of November, 1942?

A. You mean a word picture of it?

The Court: Yes, so that we can see it in our mind's eye. That is what we are trying to get at. You have not told us anything about the building except it is a five-story building. What is the construction of it? How is it constructed? What is the material? What does it look like?

A. In 1942, at the time the property was taken away from us, we had a five-story building, constructed of reinforced concrete, brick finish, pressed brick, finished brick, not a smooth brick, a rough decorative brick. The windows were the factory type, steel sash windows, on three sides. The trim around the window was white, sort of a clay product called terra cotta, to give it a decorative effect. The area of the building, that is, the size of the floor space was 88 feet wide and 132 feet long, comprising some 59,000 square feet of floor space. The floors, likewise, in the building, as well as the walls, were reenforced concrete, had columns throughout the building to support the structure. In the basement area, as we [fol. 115] know it, we have the boiler room and had our water softeners, and most of our power equipment is located there. We also had room for supply storage in the basement room. The whole building was fitted with an elevator, a freight elevator, capacity of 4,000 pounds, or over, running from the basement to the fifth floor. On the first floor, we had our offices, which took up about one-fourth of the area of the first floor. There we had our general offices, our private offices and such rooms that were necessary to carry on our administrative work, sales department, and so forth. We also had a supply room there, or a commissary, so to speak, from which we issued the supplies to the various departments as they were required. We had on this same floor a repair shop for repairing our automotive equipment and a control room in which we housed all of our electrical control equipment. All of our equipment throughout the plant was electrically operated. We did not make our own power. We bought our power, and therefore did not have steam engines, but all this equipment is operated and controlled by electricity, that and air both, so we had this control room in which were the panel boards [fol. 116] and the remainder of this floor, the greater part of it, we had our loading and unloading area, in which our trucks carried in and unloaded their laundry and cleaning and whatnot, and reloaded again. There was also a chute, a spiral chute construction throughout

the building from the shipping room from the first floor to the fifth floor, in which the finished laundry came down to the shipping room and where the trucks picked it up and loaded it up and took it out for delivery. Our soiled laundry was taken out by means of elevator. On our first floor of operations; that is, the second floor in the building, we had what we call our family work. The number of machines on that floor, total washing machines of various types, I believe around fifteen to eighteen washing machines, two flat-work ironers, and all the equipment necessary to provide what we call family laundry work. That is the entire family bundle, picked up, laundered, and returned, either by just washing only, or in some cases, washing and drying entirely, washing and ironing some parts of it. That is what we call our family work. I want to explain that each floor was independent of the others. It was a laundry in itself, [fol. 117] especially provided with the equipment necessary to do the work of its particular department. It had no connection with the other floors so far as operations were concerned. The third floor consisted of, likewise, washing machines, a wash room, washing machines, shirt finishing machines, press machines, and all the equipment necessary to do finished work in a laundry. We had what we term bachelor laundry. Of course, that is where a man sends his shirts and socks and underwear and handkerchiefs to be laundered, or in the earing of a family bundle, where they send the entire bundle to be finished, it provided the machinery to completely finish everything. It had, again, its own wash room, its own facilities for finishing the work and completing it and wrapping it and sending it to the shipping room, independently operated, independently supervised from the other floors, and all these floors, keep in mind, had an area of 88 by 132 feet, of which all of this, except space provided for lockers, was taken by machine operations. On the fourth floor we had, likewise, a wash room in which we handled in a small area the commercial work. That consists of hotel work, flat work, work we were

[fol. 118] doing for railroads and restaurants and hospitals, and like that. That was called commercial work, on which there were special rates made because of the large volume obtained. That took up approximately one-third of that floor area. The remaining one-third, was equipment, dry cleaning machinery for doing dry cleaning work, which consisted of men's suits and women's dresses, and drapes, and anything that can not be termed laundry. There we had many types of various kinds of press machines that are required to finish various types of garments, cleaning machines especially constructed for the use in a business and in a plant such as ours. We likewise had a very complete finishing department in men's hats on this floor, and for drapes. On the fifth floor, then, we provided first our cold storage facilities. We were not only launderers and cleaners, but we cleaned fur coats, we cleaned and repaired fur coats, furs of all kinds, which is a special process. Fur coats are not cleaned by being put in water or in fluid, but rather by a method known as sawdust cleaning method,, and we had equipment for the cleaning of that, and for the purpose of repairing and making fur coats. We were in [fol. 119] that business. Likewise, in these cold storage vaults, we stored these furs during the summer months for our customers, and had a consideration of cost based on the value of the fur. We had a pillow renovating department on this floor, in which we took customers' feather pillows, renovated them by the process of taking and removing the feathers from the ticks, washing and sterilizing the ticking; that is, the outside covering of a pillow, and sterilized and renovated the feathers in this special pillow renovating machine, which would both clean and sterilize and revive the life in the feathers to give them fluffiness. That was quite a business, and the only one of its kind in this area. Likewise, on this floor, we had the process of finishing fine linens, laces, lace curtains, and such fineries that many homes are very careful about and care a good deal as to the values, beauty, and so that required special equipment and specially trained people to produce. Likewise, the renovat-

ing, washing in some cases, and dry cleaning in others, of blankets, especially woolen blankets, required special machinery for washing, special washing machinery, combing machines which comb up the nap, special drying [fol. 120] frames and machinery which we dried these blankets on. Likewise, those things such as quilts and comforters, and the many, many items that go to make up the special operating department known as these specialties department. In many cities, and likewise here, there are special laundries—

Mr. Murphy: If the Court please, I believe we are getting beyond a description of the property.

The Court: You were doing very nicely up to date, but you are heading off.

A. Likewise, on this floor, we had our lunch room. We provided a lunch room for all of our employees. They had but thirty minutes for lunch—

Mr. Murphy: Again I object. I think we are getting off into the operation of the business.

The Court: You had a lunch room. That would accommodate how many people?

A. Our 200 or more employees.

Q. You mean kitchens and so forth?

A. Kitchens and tables and all accessories necessary for it. Also, on this floor, elevated somewhat from the level of the fifth floor, we had what we call our tank heater house, which was all enclosed, in which we had two large tanks, one a ten thousand gallon cold water [fol. 121] tank, and one ten thousand gallon hot water tank, and also, this housed a hot water heater and tank enclosed, copper lined, in which there are coils and by which a transfer of heat units form steam into the water and we had the hot water necessary to use in the operations of a laundry business. There were proper facilities on each floor for locker rooms and necessary facilities for all employees. One more thing in connection with our cold storage vaults. Of course, it was necessary to install, and was there and operating perfectly, the compressors and equipment necessary to provide these vaults

with the temperatures required for the storage of furs, installation of equipment of that kind.

Q. Do you have some photographs you can furnish us of the building and the floors, and so forth. A. I do have.

Q. You have those and they are going to be introduced? A. Yes.

Q. That is the outside of the building, and I think you have one or two of the inside pictures, too, do you not? A. Yes.

Q. When the army started in there in November, 1942, [fol. 122] what was the nature of the laundry, generally, that came in that was to be used in these facilities for laundry. The general nature of it as compared to what it had been under your operations previously?

A. The accomplishment of the finished article?

Q. No, the kind of material that came in to be laundered, as compared to what it was before?

A. Some of it was similar, in that in the operations of the army we had to do the laundry work for the enlisted men. That consisted of their personal clothing; and the officers, likewise; mostly woolens, to a great extent, but not entirely so. Also, a great amount of flat work. That consisted of sheets and pillow cases and mattress covers.

Q. Blankets?

Q. Well, I am just breaking it down. Then there were the blankets and quilts, comforters, the army comforters that are used, hospital linens and the renovating work. By that I mean clothing that was turned in by the soldier when he was transferred, or if they became worn, they were turned in to warehouses and then shipped in to us, and oh, huge vanloads sometimes, even freight carloads, for the purpose of renovating and putting back into their stores. They take those items and check them [fol. 123] over and size them, if necessary, and utilize them again if they are in good shape.

Q. How about dry cleaning?

A. The dry cleaning consisted of—

Q. I am talking about the government. Did the government use that? A. Oh, yes.

Q. That was part of the operations they had in there?
A. They used everything but the cold storage facilities.
Q. Everything that you had in there?
A. Yes. Not curtains.
Q. Some of the machinery that was used by the army was not adaptable to the purpose? A. Yes.
Q. That had to be used? A. Yes.
Q. What was the result?
A. It had a very deteriorating effect upon the equipment. We were even required in our operations to do dye work, something we were not set up to do, many, many thousands of pounds of clothing that came in and they had to dye it, and used our washing machines as dye vats, for which they were not particularly adaptable.
[fol. 124] What did that do to them?
A. Well, I can't say, outside of discoloration and normal deterioration by its use, that the dye had any special effect upon the machine.
Q. Do you have a list or composite statement you made us of the number of bundles that went in the Kimball Laundry Company when you were operating as the Kimball Laundry Company? You will recall you were here in the courtroom when we introduced an exhibit that showed 400,000 of gross business being done in 1942, and we desired to connect that up with bundles in some way? Do you recall that? A. I recall that.
Q. You do have, do you not, a tabulation you have kept, a personal tabulation you kept?
A. The tabulation I have is merely on some items. There was no record kept of all the pounds of laundry or dry cleaning that passed through our plant in the course of a month or a year. There was no need of it. There was no special use to which it would apply, but merely as a yardstick, so to speak, or a guide, we did keep track of certain individual items in some cases, and certain individual poundage in other cases. Yes, I have such a statement.
[fol. 125] You just pick out what you have there and

we will see if that doesn't pretty well meet the point we have got.

A. This isn't in very good shape, but it can be read.

Q. Is that your own compilation?

A. Yes, taken from our records.

Q. And you did that yourself? A. Absolutely.

Q. You didn't just make it up for the purpose of this trial?

A. It was my purpose in keeping this to determine the trend of the entire business from time to time.

Q. That went from 1932, to when? A. 1941, inclusive.

Q. Read it off into the record.

Mr. Murphy: Object to any reading off into the record.

Q. Tell what it was.

The Court: Suppose you examine the book.

The Witness: I have it prior to that. I have it until 1926.

Mr. Murphy: If counsel will identify it and offer it in evidence as an exhibit—

Mr. Hotz: That is what I was trying to do when you [fol. 126] stopped me.

Q. Explain that exhibit, or the notes you have there. What is it?

The Court: He has already testified that he kept a partial record of the poundage and packages that went through the laundry. Now then, what are the columns or figures, what do they represent as shown on this sheet?

A. I want to be sure we understand this does not represent all the work that went through. It is just as a guide In the first column is the total number of shirts that passed through the plant.

The Court: For what length of time?

A. Each year from 1932 to 1941, inclusive, broken down by years.

The Court: What year now?

Mr. Murphy: I suggest if this is offered in evidence in the same manner as other similar exhibits, for the sole purpose of showing capacity, we will have no objection.

The Court: Suppose we agree these documents, and I take it from his testimony they are all alike, show on their face the period they cover, show the amount, and [fol. 127] they may be received in evidence for the purpose of showing capacity, or tending to show capacity, without further identification or objection. I will receive your book in evidence, and proceed.

Q. Exhibit 24 is the document you have just been talking about, is it not? A. Yes.

Mr. Hotz: We will offer Exhibit 24 in evidence.

Kimball Laundry Exhibit No. 24, appearing in Vol. III, at Page 1069.

[fol. 1069] D. EX. 24 (Received)

	Shirts	Curtains	Blankets	3/4 Finish	Flat Hotel	Flat Finish Family	Apparel Finish Family
1932	532,566	33,451	11,330	783,166	538,146	149,856	84,480
1933	460,942	26,676	7,873	621,277	463,335	107,131	56,568
1934	528,094	27,812	9,244	583,420	591,054	109,016	56,876
1935	561,254	29,879	8,953	587,497	677,415	109,940	56,037
1936	611,444	34,424	8,227	605,418	790,711	116,190	58,254
1937	631,037	37,434	4,498	654,439	904,439	131,189	60,005
1938	575,109	36,462	4,708	585,002	699,707	169,041	82,351
1939	568,164	38,453	4,903	538,986	817,347	197,669	95,000
1940	625,199	40,087	4,796	528,016	971,301	293,104	95,131
1941	665,357	40,705	4,473	519,801	1,120,977	232,538	115,304

[fol. 1069] D. EX. 24 (Received)—Continued

	Damp Wash	Total	3/4 Finish Bundles	Damp Wash Bundles	Flat Finish Bundles	Total Bundles
1932	1,251,240		40,285	51,368	10,617	103,084
1933	992,319	2,240,630	32,408	42,983	7,118	82,667
1934	1,312,562	2,652,929	31,933	62,612	7,455	101,997
1935	1,373,041	2,803,930	33,744	67,385	7,861	109,190
1936	1,289,080	2,859,653	35,673	64,368	8,484	108,524
1937	1,207,450	2,957,522	39,269	61,971	9,125	110,353
1938	1,062,248	2,598,349	34,719	54,833	12,950	102,472
1939	917,259	2,566,261	31,966	46,494	14,920	93,284
1940	838,475	2,726,027	31,488	42,178	15,063	88,729
1941	837,952	2,826,572	30,085	41,206	16,808	88,431

Q. Will you tell us, in explanation of that exhibit, in the absence of having copies, will you take the first column and tell us what that is up at the upper left-hand corner, and what does it say?

A. The first column shows the number of shirts that were finished.

Q. How many were there?

A. Let me finish—shows the number of shirts finished in our plant each year from 1932, broken down by years, to 1941, inclusive. In 1932, there were 532,566 shirts.

Q. How many in 1941? A. 665,357.

Q. Give that through with all of them, each one of them. There is only a comparatively few. I want to get [fol. 128] it in the record at this point, and let's see what this is about.

A. Curtains was the next specialty item, 33,451 in 1932, and in 1941, 40,705. Blankets, 11,330 in 1932, and 4,473 in 1941. Three-quarter finish—that is one of our services we had—783,166 pounds in 1932, 519,801 pounds in 1941. Of Commercial flat work, 538,146 pounds in 1932, and in 1941, 1,120,977 pounds. On flat work out of family bundles, in 1932, there was 149,856 pounds, and in 1941, 232,538 pounds. In wearing apparel, out of that all finished service; that is, that family finish service, in 1932, 84,480 pounds, and in 1941, 115,304 pounds. In damp wash, another family service, in 1932, 1,251,240 pounds, and in 1941, 837,952 pounds. I have a total of those. That is total pound weights.

The Court: Let us not confuse it. How about 1942? How does it compare with 1941, from your recollection? You were in charge of the business. Was it about the same or was there a fall-off?

A. There was an increase in business in 1942.

The Court: What I mean by that, the capacity—was the capacity of the building in any way changed, or the land? A. No.

[fol. 129] Q. It would be that much as you have given, or more, in November of 1942?

A. I would say it would be more. There was an increase.

Q. Calling your attention to Exhibit 10, which was identified by Mr. McDougal, Exhibits 10 and 11—

The Court: We will take an adjournment until ten o'clock tomorrow morning.

Court convened at ten o'clock, March 6, 1946.

Mr. Hotz: In connection with Exhibit 19, which was the one that was signed by John Latenser, Jr., Mr. Murphy, at our request, has agreed to state in connection with that exhibit that Mr. John Latenser has the qualifications of a competent architect.

Mr. Murphy: We do so agree.

Mr. A. L. Jacobberger then resumed the witness chair for further direct examination by Mr. Hotz:

Q. Exhibits 10, 11, 12 and 13, I will ask you to state whether or not those exhibits, which were identified by Mr. McDougal as having been made by him, reflect evidence of capacity and volume of the plant in November [fol. 130] of 1942, as you view it as the manager of that plant?

Mr. Murphy: Petitioner objects as calling for a conclusion of the witness and not the best evidence. The exhibits speak for themselves as to what they reflect.

The Court: Sustained. It might be helpful if you would show what the cost of poundage was to the user. That might reflect in a way, remotely or indirectly, the poundage. Let us get the price list.

Q. Do you have knowledge of the costs that you charged to your—

The Court: Not the costs, the charges to the customers by pound or by piece.

A. Yes, I do have.

Q. Do you have anything here in the courtroom, or can you tell us offhand from your memory, as to what they were in 1942, as to the different items that came in,

such as shirts and commercial work, and things of that type?

Mr. Murphy: Petitioner objects to that question as irrelevant, immaterial and incompetent, for the reason it is not evidence of fair market value or fair rental value of the property taken and is not related to any issue [fol. 131] in this case; is evidence relating solely to the business and profits of the business.

The Court: I don't think so, Mr. Murphy. I think it is evidence of the capacity. We are trying to get an idea of what the capacity of the plant is. We have not yet reached the question. It is really fundamental in the case, the fair market value of the use of the property. We are going to get a description of the property so as to be prepared when the time comes to determine by the verdict what the fair market value of the use of that property was during the term that it was taken. Holding that view, I think it is some evidence. Objection overruled.

A. As I understand the question, do I know the prices that were charged?

Q. Yes, and can you give them?

A. I could give a few of them. There were various items and I couldn't possibly remember all the prices for each item that was charged.

Q. I am speaking now about the Kimball Laundry Company operation in 1942, not the government operation. A. Yes, I know that.

Q. Do you have anything here from whence you could [fol. 132] give it?

Mr. Murphy: Petitioner objects to that as irrelevant and immaterial and not the best evidence. Exhibit 10 already is in evidence containing in dollars the total amount of business.

The Court: I thought we could break it down. If we knew shirts cost fifteen cents apiece, that goes to make up these dollars; that poundage cost twenty-five or fifty cents, or whatever it was—I thought we might be able, if we were inquisitive enough, to break down and see

what the capacity of that plant was as reflected by that exhibit. I will sustain the objection on the form of the question.

Q. State the charge that was made by the Kimball Laundry Company in November, 1942, for the various items, shirts, and go as far as you can.

Mr. Murphy: Objected to as incompetent and immaterial, dealing with a matter of business and not within the issues of this case.

The Court: You are not insisting on the objection that it is not the best evidence, is that it?

Mr. Murphy: Yes, and that it is not the best evidence.

The Court: If you have records of the company show [fol.133] ing the charges, and you should have in 1942, let us produce the records. What have you here?

Mr. Hotz: We will ask the witness.

The Witness: As I understand it, you are asking me for a price list?

Q. Yes.

A. I don't have it here. I possibly could get it. There may be five or six hundred items.

Q. Don't go that far. We want to know, just as the Court said, shirts and collars and so forth.

A. I can give you the prices on the items referring to that exhibit that we had yesterday afternoon.

Q. Let us see everything you can get and who made the prices?

A. Myself, along with the assistance of Mr. Fred Jacobberger.

Q. And you know they are accurate? A. Yes.

Q. And that is what actually was charged? A. Yes.

Q. And that they do reflect—

The Court: That is not the best evidence. We are entitled to the record, if you have it.

Mr. Hotz: Do you insist on it?

Mr. Murphy: I don't want to take up too much time. [fol. 134] The Court: We will give you all the time you need. Let us try the case well.

Mr. Murphy: I am primarily interested in my position. This evidence, without the records, is incompetent and not within the issues of this case, and I wonder if we may proceed with the record of following throughout the line of questioning, without a specific objection in each case, and I do object to this particular question as not the best evidence, the books themselves being the best evidence.

Q. Will you get that price list and have it here as soon as you can today?

A. I could send for it now, if you want it now.

Q. Could Fred do that? A. Yes.

Q. Tell him what it is.

The Court: The price list for the year 1942 for all rough laundry. We don't care about the fancy stuff, because it is too much work to break it down, but there is a lot of laundry, the bulk of it, so that we can get some idea of the capacity of the plant.

The Witness: The O. P. A. file, price list. There is [fol. 135] a copy from the O. P. A. records.

Q. Handing you three photographs marked Exhibits 25, 26 and 27, I will ask you if you know what they are and when they were taken, each one, describing what it is, beginning with Exhibit 25.

A. Exhibit 25 is a picture of the Kimball Laundry Company building, an exterior picture, taking an angle view from the corner of 15th and Jones Streets, looking north. This picture was taken by Mr. Bihler, in, I think it was October, 1942. Number 26 is again a view of the Kimball Laundry building from the 15th Street side. It is a side and back view of the same building, taken again by Mr. Bihler, on the approximate date of October, 1942. And likewise, Exhibit 27 is a picture of the Kimball Laundry Company, showing the adjacent attached building known as the Graham Ice Cream Company, taken from the Jones Street, looking eastward, giving a front view of the Kimball Laundry Company building, taken at the same time, around October or November, 1942, by Mr. Bihler.

Mr. Hotz: We offer in evidence Exhibits 25, 26 and 27.

Mr. Murphy: I would like permission to ask two or three questions.

[fol. 136] The Court: It will be allowed.

Mr. Murphy: Q. On Exhibit 25, in the foreground is a five-story building. Perhaps I can distinguish it from the other buildings by referring to it as showing white trimming about the windows, is that correct?

A. This four-story part?

Mr. Murphy: Q. Yes, and the floor above?

A. That is the addition in 1935.

Mr. Murphy: Q. To the left of the picture appears a four-story building, also. Is that a part of the Kimball Laundry? A. This one?

Mr. Murphy: Q. Yes. A. No.

Mr. Murphy: Q. And to the right of the picture back of this last vertical row of white trimmed windows I see other brick buildings, or stone, one or two, immediately adjacent? A. No.

Mr. Murphy: Q. The Kimball Laundry Company is this even five-story building with white trimmed windows on the first four floors, and then a fifth floor above?

A. That is correct.

[fol. 137] Mr. Murphy: Q. And showing you Exhibit 26, to the right appears a detached building, the word "Union" above it. That is no part of the Kimball Laundry?

A. No.

Mr. Murphy: Q. Again the description I just used as to the front, shows the Kimball Laundry building?

A. Yes.

Mr. Murphy: Q. And Exhibit 27, to the right is a detached building, which is obviously no part of the Kimball Laundry? A. No.

Mr. Murphy: Q. But to the left is, for the first four stories, again, an adjoining and attached building, but is that any part of the Kimball Laundry? A. No.

Mr. Murphy: Q. Again, the Kimball Laundry ends at the edge just outside of the white windows? A. Yes.

Mr. Murphy: With that explanation, we have no objection to the exhibits.

Kimball Laundry Company Exhibit No. 25, appearing in Vol. III, at Page 1070.

[fol. 1070] D. EX. 25 (Photo Received)

Picture of the outside of the five-story Kimball Laundry Company at time of taking.

[fol. 138] Kimball Laundry Company Exhibit No. 26, appearing in Vol. III, at Page 1071.

[fol. 1071] D. EX. 26 Photo. (Received)

Picture of the east side of the Kimball Laundry Company at time of taking.

Kimball Laundry Company Exhibit No. 27, appearing in Vol. III, at Page 1072.

[fol. 1072] D. EX. 27 Photo (Received)

Picture of main entrance of Kimball Laundry Company at time of taking.

The Court: Pass the exhibits to the jury and they will have them now and examine the exhibits.

Q. You have been continuously in the plant devoting your sole and exclusive time to that business, have you not, since it was taken over by the government on November 22, 1942? A. Yes, I have.

Q. And you had occasion to go throughout the plant daily?

A. Well, not only occasion; it was my responsibility to be all over the plant several times every day.

Q. You were here in the courtroom, were you not, when both Mr. Goodwin and Mr. Kinder testified in reference to Exhibit 21, a copy of which you have in your hand? A. Yes, I was here.

Q. And you heard them testify as to the items of values in Column No. 2, on November 21, 1942, and in November of 1945, in the last column? A. Yes.

Q. I wish you would explain generally to the court [fol. 139] and jury about, particularly those items that have a valuation listed as of 1942, and then there is no figure in the column of 1945?

The Court: In other words, the missing machinery when the last inspection was made.

Q. Tell us what you know about it, to your own personal knowledge. Give us the facts in connection with it all.

A. Having been there at the time that Mr. Kinder made this final appraisal of this equipment, working with him and helping identify the pieces of equipment, in many instances, when his complete job was done, there were a number of things that couldn't be found, and I know from having been there all this time that many of these items that can not be found were destroyed during the past three years and are not there to be found in any way, shape or form. There may be a piece, but for the intent and purpose as it was there for the Kimball Laundry Company, it does not exist and has been destroyed, and therefore has no value to the Kimball Laundry Company.

Q. And wherever there is a blank in that third column, does that mean that that item is gone, just as you have stated?

[fol. 140] A. Those were gone, entirely destroyed or rendered absolutely valueless.

Q. Give us some statements as to the condition of that laundry machinery and equipment. Explain to us the result of this three and one-third years use.

A. I am just taking all the machinery generally. I am talking about the laundry machinery and dry cleaning machinery, washing machines, flat work ironers and press machines and items of that kind. They have been put to a tremendous amount of work, of use, during the last three years, working sixteen hours a day, some days, and some days, longer. We were forced, and because of the volume of work it was necessary to produce, as I explained yesterday, most of the time to overload the machines and put a greater load upon them than they are

built for. As a result, there was great deterioration and wear and breakage.

Q. Greater than that which would have been under Kimball Laundry operation?

A. Much greater. This wear, some of it could be repaired, but at the time there was not the repairs available, nor the time to repair these machines and keep them up as they had been kept up by us. It was a matter of get-
[fol. 141] ting a job done. It wasn't a matter of what it cost or what it took. It was a matter of doing the job with the available equipment that was there and the equipment that was there was taxed far beyond its capacity in order to produce that job, and therefore, the wear and tear on the equipment. As to many of the items in here that show no value, that are missing, I believe I tried to explain yesterday that when the army took over we had to change our entire plant layout. We had lots of things built for the use of the Kimball Laundry Company that had no particular purpose in the quartermaster laundry, because their operations were entirely different. Therefore, many of these machines were torn away from the place they were hooked up. Originally they were piled on one of the floors and then were finally taken and put away in storage and left there, until just recently they were hauled back. I had an occasion to be out and see what kind of storage they were in and know what condition they were in; they were rusted and in bad usable condition. Many of them were taken apart and so spread around it is hard to get them together. Other things, such as wood construction bins and tables and racks were destroyed. I mean they were taken apart, the lumber used
[fol. 142] for something else. It was necessary to do that because you couldn't order lumber and get materials there on a moment's notice, and we were in a hurry to get the thing going for the army. They took over one day, on the 22nd, and I think the 23rd, the next day, we started doing work for the army, and it grew constantly, very fast, so we had to use what we had, is all.

Q. Is there a record of the amount of work that came in and ran through that laundry by the army?

A. Yes, they kept a record of it.

Q. And under whose supervision and direction is that?

A. The chief clerk makes up that record.

Q. Who is that? A. Mr. McDougal.

Q. That is the same man who testified here? A. Yes.

Q. Would Mr. McDougal's records be able to show, if we had them here in court and they were admissible in evidence, the manner of handling that laundry by the quartermaster corps to show the amount of it and how it was charged and how it was handled? A. Yes.

Q. Just how, in a general way, did the quartermaster corps handle it when that laundry went through there? [fol. 143] Were they charged with some responsibility to get it back to the soldier in proper form? In other words, would he be able to state if anybody else did, or how did that work?

Mr. Murphy: Objected to as incompetent and immaterial whether he paid for it or not.

The Court: That will be sustained.

Q. But the volume is there to show the amount of volume that went through that plant?

A. Yes, definitely, pieces that went through the plant and income thereon.

Q. That is all there? A. Yes.

Q. Go ahead with your testimony in connection with this machinery and equipment.

The Court: You had better ask a question. Confine the inquiry to material matters.

Q. For instance, you take on page two, there is a gasoline pump and tank. That is given as entirely missing in the latter part of the year 1945 in the third column, item number 25? A. Yes.

Q. What is the fact in reference to that as being missing?

A. That originally was a gasoline tank and pump, [fol. 144] and during the past three years it has been used for the purpose of storing oil; not oil, it is cleaning fluid, is what it is; it is petroleum cleaning fluid, and that sits on the outside of the building. I think it shows

on the picture, one of these pictures, and the pump, the dials, and mechanism, and the meters and everything on that have been destroyed by neglect and trucks backing into it, and things of that kind, and it is just worthless. It has to be replaced, in other words, to be used as a good, competent gasoline pump when you meter your gasoline out of it.

Q. On page 4, for example, items 72 and 74.

A. Item 72, I just happen to know, is entirely missing. They can't find it and neither can we. I remember checking with one of their engineers.

Q. How about shades and curtains for the entire building?

A. They are completely gone. They are made of canvas material, about a number six duck, and on rolls, some of them, and some of them—all of them are on rolls of one form or another, and they are completely shot; in other words, they just have no value left; they are in holes, torn in shreds and ribbons.

[fol. 145] Q. Was any attempt made to keep them up at all?

A. No, we had no material to use for that purpose. That was part of the job, to maintain the building, and we, the quartermaster, had nothing to do with that.

Q. The plant was supposed to be maintained by another organization than that which was running and operating the plant?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial; leading and suggestive; and calling for a conclusion of the witness.

The Court: Sustained. Let us confine ourselves to the matters involved.

Q. Numbers 112 and 113—

A. What page is that? 13?

Q. No, it is page six, but they are items on the left-hand column in your exhibit. Is Item Number 112 and Item 113— A. Yes.

Q. And also 118 to 126, and from 136 to 148 on those pages—directing your attention to those items, tell us

generally what the condition is in reference to them, as you personally know them?

Mr. Murphy: Objected to as irrelevant and immaterial, the exhibit being in evidence and reflecting no value on [fol. 146] those items at this time.

The Court: Sustained.

Q. Do you know whether those items are present?

Mr. Murphy: Objected to as irrelevant and immaterial, for the same reasons as already stated.

The Court: He has already stated they were either totally destroyed or made useless because of their condition. Sustained.

Q. Is it necessary that those items be replaced in order that the laundry may operate in the condition that it was in November, 1942, or were they inconsequential things in the laundry?

Mr. Murphy: It is irrelevant and immaterial whether they were necessary or not. The government would be responsible whether they took them or not.

The Court: That is not the inquiry. The inquiry we are leading up to is what was the fair and reasonable rental value of that property on the 22nd day of November, 1942, and what damage, if any, was committed to the property while it was so leased or rented. These are inquiries that we are concerned with, and whether they see fit to replace them or not is none of our concern. That is their business. If they are totally destroyed, they are entitled to the value of the property at the [fol. 147] time it was taken from them; otherwise, it should be returned.

Q. Your brother, Fred, has brought in the items on prices on the laundry business as it was done down there in 1942. See what you can give us now from that.

The Court: Have him identify it.

Mr. Hotz: He is just looking at the exhibits now.

The Court: Produce them and we will have them in evidence and that will be the best evidence. Then we will all be able to look at it.

Q. Do you have it in your hand?

A. Do you want me to explain what this is?

Q. Yes.

A. These are two reports, copies of the prices that were charged for the Kimball Laundry Company at the time they were filed on record with the O. P. A.

Q. Were they in force in November, 1942?

A. Yes, they were.

The Court: And adhered to?

A. And adhered to.

Q. Are they both the same?

A. No, one is laundry and one is dry cleaning.

Mr. Hotz: We will introduce these in evidence. You mark them as Exhibits 28 and 29, and we will ask leave [fol. 148] to have them substituted with photostatic copies, or typewritten copies.

The Court: That is, they will remain here until the trial is completed?

Mr. Hotz: Yes.

The Court: And then you ask leave to have these original documents withdrawn and copies thereof, or photostatic copies, or typed copies thereof, substituted?

Mr. Hotz: Yes, sir.

The Court: Is there objection?

Mr. Murphy: No objection.

The Court: It is so allowed.

Mr. Murphy: No objection to that procedure. I do want to object to the exhibits when they are offered. They are not offered yet.

Mr. Hotz: We offer in evidence Exhibit 28, containing ten pages marked "Laundry Service Prices Kimball Laundry Company," and Exhibit 29, consisting of nineteen pages, "Dry Cleaning Prices of Kimball Laundry Company."

Mr. Murphy: Petitioner makes no objection on the ground of foundation, but does object to the two exhibits, and each of them separately, as incompetent, irrelevant and immaterial, and not within the issues in

[fol. 149] this case, and pertaining solely to the matter of business operation and business costs and profits.

The Court: If the purpose of the offer is to support other evidence touching the capacity of the plant, these exhibits will be received for that purpose and that purpose only. Your objection will be otherwise sustained. Is that clear?

Mr. Murphy: Yes, Your Honor.

Mr. Hotz: They are offered under that theory of the case and they were the prices that were in force and effect in November, 1942.

The Court: That has already been testified to. These are the prices which went to make up the dollar column in these other exhibits showing the business work that was done, and then reduced it to poundage and pieces.

Kimball Laundry Company Exhibits 28 and 29, appearing in Volume III, at pages 1073 and 1074, respectively.

[fol. 1073] D. EX. 28 (Received)

D. Ex. 28 is itemization, consisting of several pages, of laundry service prices for the Kimball L. Co., itemized as to various types and kinds of laundry.

[fol. 1074] D. EX. 29 (Received)

D. Ex. 29 is itemization, consisting of several pages, of dry cleaning prices for the army, cadets, R. O. T. C. and air corps uniforms, suits, and civilian garments.

Q. Is the condition of the machinery and equipment now in the building of the Kimball Laundry Company, known as the Kimball Laundry Company, as shown on Exhibit 21, in such condition that the plat could be operated by the Kimball Laundry Company?

Mr. Murphy: Objected to as irrelevant and immaterial; [fol. 150] going into a matter of business operations and not the condition of the machinery, and not the best evidence.

The Court: Sustained.

Mr. Hotz: We offer to show by this witness that the plant can not be operated at all at the present time by the Kimball Laundry Company owing to the destruction of certain machinery which the witness is ready to describe and show is necessary for the operation of the laundry, and the only reason that it has been operated by the government is that the government itself has put in a temporary machine to perform the operation, but that the machinery of the Kimball Laundry Company in that respect is gone and the plant can not be operated at all.

Mr. Murphy: Same objection to the offer as to the question.

The Court: Yes, you have already shown the condition of the plant. You are not, surely, going to have the witness change his testimony. He has testified to the condition of the machinery. He has testified to the destruction that has taken place, and from his testimony, I gather, as I am sure everyone else does, that the capacity of the plant is greatly destroyed or reduced because of that. I can go down and operate one by myself, [fol. 151] and I don't know anything about a laundry.

Mr. Hotz: I don't think so. Nobody could do it. If you would let the witness testify that certain vital machines could not be operated at all—

The Court: Will you take your chair? Proceed with the case.

Q. Explain to us something about the condition of the building from the time they took it over in 1942? Try to be as specific as you can and confine it to the number of things that show that that particular building was needed by the Kimball Laundry Company in its operations, and show what damage has been done to the structure of the building itself.

Mr. Murphy: Object to the question as being incompetent, irrelevant and immaterial and entirely too broad. I have no objection to the witness testifying what he may have observed in the way of damage to the building.

The Court: The witness has already testified that there was certain damage to the building in the way of the tearing down of the walls and concrete structure for the moving or removal of certain machines, and has valued that with other damage, I think, in one of these [fol. 152] statements, at $5,000.00. If the question has to do with additional damage other than the ordinary wear and tear, he may testify.

The Witness: It does have to do with additional.

The Court: In addition to that and beyond the ordinary wear and tear?

The Witness: Yes, sir.

The Court: That is what we want.

Mr. Murphy: May I have permission to ask the witness a question?

The Court: Yes.

Mr. Murphy: Q. Have you not had the building examined by competent contractors and repair men, and have you not obtained an estimate of the cost of repair of whatever you claim to be damaged to the building?

A. Mr. Harry Jacobberger has done that, got the figures.

Mr. Murphy: Q. That has been done? A. Yes.

Mr. Murphy: Object to the question as incompetent and immaterial; not the best evidence; it being obvious that they have the best evidence available as to what that is.

The Court: Overruled. This is one of the owners of [fol. 153] the property who is testifying and has knowledge of his property, and has testified he made an investigation and it is for him to say, what in his opinion, it has been damaged. An owner of the property should never be denied the privilege of describing his own property and testifying how it has been handled or damaged, in his opinion. That goes with the ownership of property, the right of property. He should not be denied that. Go ahead, Mr. Jacobberger.

A. I will give specifically the items that were damaged on the outside of the building on the east side, the sidewalk is entirely broken up, damaged as a result of heavy trucks having been backed over them. There is a steel area-way on the sidewalk which can be opened up and allow supplies to be brought into the basement. That has been run over by trucks and needs repairs, perhaps new doors; whatever it needs to fix it. Then, as these trucks back up to unload against the building—

The Court: What trucks are you referring to?

A. Government trucks. The laundry was all brought in by army vehicles, large trailers they had, to back up against these openings which were made after the army took over. They took out some window structures there, [fol. 154] steel frame, and they broke up that terra cotta trim around the windows in many places where they hit the building and otherwise scarred and disfigured the brick work, places wherever they jammed into the building. Then, on the inside in our shipping room, or garage—that is the first floor I am talking about—there has been considerable damage done to the surface of the concrete floor because of the racks that we had provided there. Under Kimball Laundry ownership, they had rubber tires on them. Under the heavy loads that these racks had to carry for government operation, army operation, the rubber tires wore out and they were subsequently replaced with steel rimmed tires. That steel and those heavy loads cutting over that concrete just had a tendency to break it, chip it and wear it, and sort of—well, it is a process of friction between the wheels and constant grinding of sand and cement and they have worn it very uneven and rough. They will have to be replaced. The next thing, the elevator doors. The elevator, itself, is a large freight elevator. The doors, particularly, and the panels on which the elevator operate, the floor of the elevator has become [fol. 155] worn and loosened because of the three years wear without any attention or repair made on it. On

the second floor, and as a matter of fact, on the third and fourth floors, the washroom gutter—in the laundry we have a gutter in the washroom underneath the washing machines that carries away the water from the washing machines. As we dump the water out of the machines, it runs down the gutter to the sewer, and in this particular construction of the building, these gutters were put into the floor construction originally; that is, in concrete, and then were covered over with a mastic, I think they call it, rock asphalt covering about an inch and a half or two inches thick, and between that rock asphalt covering and the concrete there is a waterproofing—it might be something like tar paper—to keep the water from seeping through the gutter into the concrete of the building itself. These gutters are leaking water. Water is leaking from one washroom gutter to another, particularly from the third to the second, and from the second down into the shipping room, and it now means that we have to replace, in those places, the gutters, the top surface of the gutters, the rock asphalt, which is the waterproofing. During the course of the three years [fol. 156] which this plant was used, using heavy loads on all floors—that is, we had to haul large racks of laundry and dry cleaning and they were not confined to small baskets—we built the larger ones because we had large volumes to handle—the result of that was that the floor, itself, and the working area of the employees was a mastic flooring—it is very similar to linoleum, but it has about the resiliency of linoleum so that people will not stand on hard concrete floors—and in using truckage over that kind of a floor we have to keep the weight to conform with what the floor will handle, and by all means, you must use rubber tire equipment—again, as a result of wearing out the rubber tire equipment, those racks were supplied with steel equipment and run over this floor, and the result was that practically the entire area of the second, third and fourth floors—that is that mastic covering—was destroyed, and later on replaced.

but in the period of destruction, not only did they wear out the mastic flooring, but again, the steel gouged into the concrete—in some places there are indents into the concrete, I would say, one-half inch, or maybe three-quarters of an inch, in special places, which have just [fol. 157] been filled up in part and not completely made smooth, so there is going to have to be repair work done on that. How much, I don't know. It depends on the area, but a considerable amount of it. While it is apparently covered, it just is not complete and satisfactory. It had to be done under extremely difficult conditions. While we were operating we had to repair the floor, and it couldn't be done to the best advantage. Then, there is the steel casement windows. The building is supplied with all steel reinforced casements, which in certain areas, particularly on the second floor, and I think on the fourth floor, are in a badly rusted and warped condition. In many places you can't pull the hinges of the windows shut any more because there is more or less moisture in a laundry and you have to keep the steel well painted and free from rust so that it won't get to the metal. That was not done during this period. On the fifth floor there is a terrazzo flooring, that floor being put on in 1935. We supplied that with terrazzo, and over that terrazzo floor, again, these heavy trucks were run and there has been damage done to the terrazzo. It has sort of copper strips at intervals that give it—[fol. 158] expansion strips, as they call it—up against this terrazzo is pasted—

The Court: Are those indoor trucks or outdoor trucks driven into the building?

A. The inside trucks are large wooden inside trucks with wheels to carry the laundry.

The Court: These are trucks, you say, equipped with steel wheels, and that damages these floors?

A. Yes, those trucks were loaded with wet clothing and would carry, I would say, in excess, or approximately a ton of clothing. They were built to handle about a

ton of clothing. That is when it is wet and contains the moisture, and they had, for the most part, five-inch wheels, with about one and one-half inch bearing on the face of the wheel.

The Court: I take it that the outside heavy army trucks only entered the basement, or down on the first floor?

A. Yes, so I am talking about the damage to the floor done by these trucks—I mean push trucks, is what they are—large wooden push trucks with steel wheels. There was also damage incurred to the building—we have two large water tanks, as I explained yesterday, to supply [fol. 159] the water to the washroom, both hot and cold water tanks, and for a period of a year, the valve, the automatic control valve on this hot water tank wasn't working satisfactorily. It would stick, causing the tank to run over, the hot water tank to run over. This hot water tank ran over two or three or four times a day for a long period of time and the water drained down. Of course, there was a sewer there to catch most of the water, but the volume of water was too great for the sewer, and as a result, it come down through the ceiling structure of the fourth floor, followed apparently where you could see cracks, and it would run on down and we would have to mop it up off the floor. There has been damage done there to some extent to that four-inch slab, which is a reinforced steel concrete slab. That moisture going through there, and particularly soft water coming in contact with metal, has some deteriorating effect. I have no way of telling what it is. We have a brick smoke stack that rises about seventy-five feet above the building, and there is, at this time, a large crack running from the top of the stack down to approximately the roof line. The stack goes on down through the [fol. 160] building, but as far as the roof line, that is there, and it will have to be fixed and repaired. There are considerable changes have been made in many instances, and damage in others, to the electrical installations, switches and lights that have been changed, and

things of that nature. To some of the plumbing installations and the woodwork connected therewith in the lavatories, there are also repairs necessary, and in many cases there has been a lot of abuse of the fixtures through the plant, and the result is that those are building fixtures that will have to be fixed and repaired. There are also, in the office, or the doorway cut through a wall, and in a special room known as our route men's conference room—they tore out some wood oak desks that were fastened to the wall as a part of the building, sort of a ledge desk—those were removed and have not been replaced. I think I have covered it as well as I can and give you an idea that the building is in need of a great many items of repair. Oh, yes, one more, during all this time there has been a deterioration of the walls and ceilings. They were in good clean condition when taken and are certainly in need of paint. They haven't been painted [fol. 161] during these three years. In many places the paint is off and in a very dirty condition. That is, the piping and walls and columns, and that is in need of repainting. Many places have to be washed and scraped; likewise, the steel frames. That applies to the fire escape, and the fire exit doors, which are a steel door, and in some places they have not been painted and are rusted, and some of the doors will have to be replaced. I think that about gives the whole picture.

Q. What would be the sum total of the damages to the building, the structural part you have just testified to, in dollars and cents, of the items you told us about?

Mr. Murphy: Objected to as calling for a conclusion of the witness; no proper and sufficient foundation laid.

The Court: Lay a better foundation, Mr. Hotz.

Q. In the operations of the Kimball Laundry Company in the past, as superintendent, what was your job in connection with keeping the building in a state of repair and having these repairs made, that have now not been made?

The Court: May I suggest, in order to save time, let [fol. 162] us see what he knows about the building, the construction of the building. Is he the superintendent in charge and does he know what that material is? Does he understand what repairs cost? Has he been making repairs? Has he kept himself advised and has he consulted mechanics, obtained estimates of what he can get things done for? If you can lay a foundation sufficient along that line, I think it will be proper.

Q. You have head the court's statement. What are the facts in connection with that matter, so far as your personal experience is concerned?

A. I certainly know and have had the experience in taking care of the repairs and upkeep and consulting with the men in reference to maintenance and what it costs, but in this particular instance, I think Mr. Harry Jacobberger has taken it upon himself to get those figures together.

Q. That is, the actual figures? A. Yes.

Q. Do you know of your own personal knowledge what this damage amounts to for the whole business?

A. Yes.

Q. What is it?

[fol. 163] Mr. Murphy: May I ask a question?

The Court: Certainly.

Mr. Murphy: Q. Do you have knowledge of the total of the figures obtained in an effort to determine these figures obtained from experts in that particular work? That is, do you have the total amount of cost of repairs as determined by the bids, or whatever investigation was made?

A. I have seen some of them. I don't have them in my possession.

Mr. Hotz: My question went to this witness' knowledge of the expense.

The Court: Just a minute. I would suggest you ask him if he has an opinion of approximately what it will cost to cover these items, and he may qualify in that respect, but he has not qualified as a mechanic as to ac-

curate dollars and cents, but he is a part owner of the property.

Q. What is your estimate?

A. To put that building back in the condition it was in in 1942, when it was taken, it will take around the sum of $35,000.00, for building repairs and construction that are necessary at this time.

The Court: Does that include that item you referred to yesterday of $5,000.00 for replacing the broken walls?

[fol. 164] No, that does not.

The Court: That is in addition? A. That is separate.

The Court: That would be, then, $40,000.00? A. Yes.

Mr. Murphy: May I ask a question

The Court: Yes.

Mr. Murphy: That $5,000.00, Mr. Jacobberger, that the Court just inquired about, is included, is it not, in your computation of damage to the boiler?

A. Yes, I included it therein because it had to do with removing the boiler and the heat reclaimer and hot water heater.

Mr. Murphy: So that $5,000.00 is already in the computations and should not be added to this $35,000.00?

A. It isn't in this $35,000.00. I just mentioned it is a separate item.

Q. And it is in this Exhibit 23? A. Yes.

The Court: I was trying to understand whether he has added it here, or whether it is a different part.

Mr. Murphy: That is a different part.

[fol. 165] The Court: Thank you for getting it straightened up.

Q. In connection with Exhibit 21, which is the list of machinery and equipment, on the bottom page of this exhibit it shows that the fair and reasonable market value of the machinery and equipment as installed, the laundry and dry cleaning equipment, and all else that is shown on that exhibit there, was on November 21, 1942, $273,831.39, and that in the right-hand column, the same items that remain had a valuation in November, 1945, of $120,699.75. From your knowledge of the laundry, what would be your estimate in connection with those

items? Would that differ from these figures, or would you concur in it, or would it be more or less, or just what is your idea, as an owner of that property?

Mr. Murphy: Objected to as calling for a conclusion of the witness and an attempt to impeach their own witness

The Court: I think the witness has testified to his appraisal of the property as part owner thereof at the time possession was taken away from them, and he has also testified to the figures you just referred to as being his [fol. 166] appraisal of the value of the property when it was turned back. I think he has covered that.

Mr. Hotz: I didn't think I had asked him the question. I have no record of asking him that. I looked through my notes and I don't think I referred to the totals with this witness.

The Court: It is not the totals that count. It is the items, the different articles of machinery, and it is a matter of computation. Anyone could do that.

Mr. Hotz: I asked him for the total of all of the machinery.

The Court: If he has added it up and has the totals, there is no reason why you shouldn't state them. The exhibit shows what the totals are, and it is correct. Have you totaled up all these items of damage to the machinery that is in the building, or left?

A. Well, I have in my own mind the figures, what they are.

The Court: Did you compute them? A. Yes.

The Court: Very well.

A. Yes, from these exhibits, I have.

The Court: You have added them up?

[fol. 167] A. Yes.

Q. What is your version? What is your opinion, your estimate?

The Court: His computation.

Q. Your computation in connection with Exhibit 21?

A. The value in the right-hand column is around $120,000.00, the value of what that equipment was.

The Court: When?

A. In November of 1945. That is installed in that building. That equipment, by no means, had that much value if it were taken out and sold piece by piece.

Mr. Murphy: Objected to as not responsive and irrelevant and immaterial.

The Court: It is not responsive to the question. You may ask another one.

Q. Is that value in the right-hand column, installed in that building for laundry purposes? A. Yes.

Q. Would it have the same value if it were taken out, or not?

Mr. Murphy: Objected to as irrelevant and immaterial and not an issue in this case.

The Court: Sustained.

Q. What about the middle column? What do you know [fol. 168] about the valuation there?

A. The middle column on this exhibit, Page 23, the last page, is the value of that equipment as valued in November of 1942, before the army took over. The total is $273,831.39.

The Court: That is the value when it was all in place?

A. Yes, sir.

Q. I am handing you Exhibit 22, and I will ask you to state what it is.

A. This is a letter written to the Commanding Officer, Fort Omaha, Nebraska, Post Engineer.

Q. How did you come to have possession of it?

A. A copy of this was in my possession.

The Court: Is that the copy or original?

A. This copy was put on my desk. This letter was put on my desk.

Q. Does it pertain to the condition of the machinery and equipment of the Kimball Laundry Company there by the Commanding Officer of the Seventh Corps Area, in reference to property concerning which we have been talking? A. It is concerning that.

Q. And is it instructions in connection with what to do in reference to it?

[fol. 169] A. It is.

Q. And in connection with the abandoning of the property?

Mr. Murphy: Objected to as incompetent and immaterial. The exhibit itself is the best evidence of what it contains.

The Court: Yes, that is sufficient identification. There might be something the matter with your foundation, however.

Q. At the time this was laid on your desk, were you the superintendent? A. Yes, sir.

Q. And it was a part of the official instructions that you obtained, official notification?

A. I received copies of all forms, all instructions and bulletins that come to the quartermaster laundry, unless they were confidential.

Q. And they were laid on your desk for the purpose of being carried out?

A. In the regular process of distributing mail.

Q. And that is such a document, Exhibit 22, is that right? A. Yes.

Q. Does it pertain to the things we have been talking about this morning as to machinery and equipment?

[fol. 170] A. It does.

Mr. Hotz: We offer in evidence Exhibit 22.

Mr. Murphy: Petitioner objects to Exhibit 22 for the reason that the same is incompetent and immaterial; no proper and sufficient foundation laid; no identity or authority shown as to the writer; not binding upon the petitioner; for the further reason, and specifically as to paragraph number two of the exhibit, as pertaining to matters not within the issue of this case as to dates, and in no manner pertaining to issues which are binding upon the petitioner, and merely being hearsay on its face.

The Court: You say this was a copy? A. Yes.

The Court: Did I understand you are the superintendent in charge of the plant? A. Yes.

The Court: Serving for the army or under the army officer? A. That is right.

The Court: You received, from time to time, instru
tions from the army officers in charge of that work?

A. That is right.

[fol. 171] The Court: And these instructions came t
you in the form of a typed letter, as is Exhibit 22?

A. Yes, sir.

The Court: This Exhibit 22 is one of these origina
typed documents that were placed on your desk, as supe
intendent, for your information and direction, is tha
right? A. Yes, sir, that was placed on my desk.

The Court: It is not a copy—it is the original?

A. There were a number of copies made, Your Hono

The Court: One of many originals made up. The ob
jection will be overruled. It may or may not have som
application.

The Witness: I want to explain—the same thing wa
posted—

The Court: The same instructions were given to othe
responsible employees or officers, the same as they wer
given to you, is that right? A. Yes, sir.

The Court: And this was yours? A. That was mine.

Mr. Hotz: I would like leave to substitute photostati
copy.

The Court: Is there objection?

[fol. 172] Mr. Murphy: No objection.

The Court: Do you wish to have it substituted now, o
at the close of the case?

Mr. Hotz: I have it and will do it now.

The Court: Is there objection to the substitution a
this time?

Mr. Murphy: No.

The Court: Read the original and show it to the jur
and then make your substitution before you carry it away

Kimball Laundry Exhibit 22, the original exhibit, rea
to the jury, and photostatic copy, Exhibit 22-A, appear
in Volume III, at Page 1067.

Mr. Hotz: (Reading Exhibit 22) Dated, January 11
1946. It has a number on it, 600.915 (Ft. Omaha) L Sub

ject: Hartford Steam Boiler Inspection and Insura Company Inspection. Report for Boiler No. 2, Omaha M. Laundry, Omaha, Nebr. To: Commanding Offi Fort Omaha, Nebraska Attention: Post Engineer.

1. Reference is made to Section VIII of subject boi inspection report relative to compliance with inspecto recommendations to install new blowoff tank in acco ance with A. S. M. E. code built for 150 lbs. w. p. a [fol. 173] installing new 4" vent line.

2. Information available at this headquarters indica that subject laundry will be returned to the owner or about 15 February 1946. In view of the short ti the Government will operate this plant and due to fact that it is impossible to get delivery on a new bl off tank for approximately three weeks, telephonic structions were issued to the Post Engineer not to com with this part of the recommendation.

3. Instructions were also given to the Post Engin that the bottom blowoff valve should be kept closed all times and at no time should valves be open unless pressure is reduced to 35 pounds or below.

4. These instructions should be issued in writing a posted with the laundry officer in charge and the ch operating engineer in order that the lives of the op ators will not be endangered during the remaining weeks this laundry will be operated by the Governme

By Command of Major General Craig:

E. F. Ketcham, Colonel, Corps of Engineers
Deputy Service Command Engineer

[fol. 174] The Court: It is ordered it may be withdra and photostatic copy substituted and marked now hibit 22-A. Let the record show Exhibit 22 is withdra and returned to the witness on the stand.

Q. What day of the week was that, do you rememb November 21, 1942? A. That the army took over?

Q. Yes.

A. They took over on a Monday, I am pretty su I think there was a little discrepancy between the ti

it was set and the date they actually took over.

Q. Are you able to state the fair and reasonable market value of the following described property, which I am reading from the petition of taking, on November 21, 1942, "The right to use and occupy the property known as the Kimball Laundry, owned and operated by the Kimball Laundry Company, a corporation, located at 1504 Jones Street, Omaha, Nebraska, consisting of the real estate known as the East 22 Feet of Lot 7, and all of Lot 8, Block 171, Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, [fol. 175] Douglas County, Nebraska, together with the improvements situate thereon, and also the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment." I want you to state, if you can, your estimate of the valuation of that property as described, as I have just read it to you, on November 22, 1942.

Mr. Murphy: Petitioner objects to the question as being irrelevant and immaterial and entirely too indefinite. He has asked both the use and the property itself, and I am sure I don't know which he means.

Mr. Hotz: I am asking for the fair and reasonable market value of that property as described in this real estate description.

The Court: You are coming down now to the question that the jury is going to have to determine and the measure of your damage is the fair and reasonable market value of the use of that property that you have described for a term of three years, through June 30th, the farthest date.

Mr. Murphy: It is November 22, 1942, until—

The Court: June 30, 1946, or a total term of—

Mr. Murphy: A little less than three years, seven months—

[fol. 176] The Court: And eight days. That is the question the jury is to determine, and that is the value that

we are trying to get now. They did not take your property. They took the use of your property.

Mr. Hotz: They have to start out with a valuation of some sort.

The Court: The valuation is the valuation of the use. We showed the value of the property, or thought we did through the testimony.

Mr. Hotz: We have a lot of things here and I want to get the owner's value of the property.

The Court: Objection sustained. Try it again.

Q. What is the fair and reasonable value of all of the property down there at the Kimball Laundry Company on November 22, 1942, when it was taken over by the government?

The Court: You mean the fee title; the title to all of it?

Mr. Hotz: The whole business, as he saw it down there—the whole thing as an operating company down there at that time.

The Court: Not as an operating company. You can show, and I have permitted you to show the value of the property that was used. If you want to sum it up with him in total, round figures, do that, but beyond that you [fol. 177] will not be permitted to go properly. Do you understand what I mean, Mr. Witness?

A. I understand what you mean, but I can't answer this question—

Mr. Murphy: You said you couldn't answer that question, isn't that true?

A. I can answer the question he asked me, yes.

The Court: Suppose you tell me what you value all that property at, at the time they took the use of it away from you; that is, the real estate and the machinery and everything in the building. What do you consider the fair market value of that property?

A. Of the Kimball Laundry Company?

The Court: Kimball Laundry Company; that is, the building and the machinery, aside from your trucks and your routes and your good will, and all that sort of thing.

We are asking you simply for the fair market value of the property in anybody's possession.

Mr. Murphy: May I suggest that the question be limited to the physical property?

The Court: I thought I did that.

A. That is in the report, the physical value of the [fol. 178] land and the building.

The Court: That is your opinion of what it was?

A. Yes, sir.

Q. I don't think you had in there the value of the land anywhere.

A. Maybe not. Well, the items, as broken down—

Q. I am talking about the land.

A. The land we valued at $30,000.00.

The Court: Do you value that aside from the value you place on the building here? A. Yes, sir.

The Court: That was in addition?

A. That is in addition to the building, machinery and equipment.

Q. Was there any other valuation that inhered to the property that was taken by the government, as a part thereof? A. Yes, there was.

Q. What was that?

Mr. Murphy: Object to that as irrelevant, incompetent and immaterial; pertaining to matter not within the issues of this case; dealing with going business values.

The Court: You have just read from the petition?

Mr. Hotz: That is the property you are dealing with, [fol. 179] and if there is anything adheres to it, that properly belongs there, to include in the values you have given us—

Mr. Hotz: Could we have the jury step aside for a moment?

The Court: You mean you want to talk about good will?

Mr. Hotz: No, I don't want to talk about good will.

The Court: You want to talk about the routes and the established going business, and so on?

Mr. Hotz: I want to talk about the measure of dam-

ages, to arrive at what they are entitled to, and our theory of the case for the measure of damages.

The Court: I thought I had your brief and studied it from your brief. Do you have something new to add?

Mr. Hotz: After that talk about this case in Utah—

The Court: You have the opinions here, I take it, and you have studied them?

Mr. Hotz: If you want me to give my suggestions before the jury, well and good. I only did that as a matter of custom. I want to discuss the legal points.

[fol. 180] The Court: Mr. Marshal, you may take a recess or announce a recess until fifteen minutes until two.

(Recess.)

The Court: Let the record show that in response to the request of Mr. Hotz, the court listened to counsel on arguments of the lawyers for a matter of half an hour, and now reconvening, you may present your question and get a ruling upon it, Mr. Hotz.

Q. What do you consider the fair and reasonable market value of the Kimball Laundry Company at the time of the taking, exclusive of the delivery trucks, exclusive of good will, and exclusive of loss of business?

A. $987,000.00.

Mr. Murphy: Just a moment.

The Court: Strike the answer and the jury will disregard it.

Mr. Murphy: Petitioner objects as incompetent, irrelevant and immaterial; not within the issues of this case; the question being the value of the Kimball Laundry Company.

The Court: That will be sustained.

[fol. 181] Mr. Hotz: We offer to prove by the witness that the value of the Kimball Laundry Company on November 22, 1942, was $987,524.32, exclusive of the delivery trucks, exclusive of any element of good will, and exclusive of the loss of profits, and that this item was made up of the fair and reasonable market value of the building, of the machinery therein, the power plant and customers routes of this particular laundry, which had been

built up over a period of ten years from $275,000.00 to $400,000.00 of gross income in ten years, and that these customers routes consisted of those shown on Exhibits 10, 11 and 12, and that these routes were inhered in that property as a part inseparable therefrom, and that they were destroyed in the taking. Further itemizing this figure, the witness will testify, comes about through $280,348.00 of the value of the building; machinery and equipment therein at $273,831.39; power equipment and incidental installations connected therewith, $62,928.08; land, $30,000.00; and as a capital asset, the trade routes evaluated by numbers of customers of different kinds, $340,516.85; that the purpose of the testimony is to show the difference in the value at the time of the taking [fol. 182] and at this time, and that in the return of said property there is only left in actual value as of this time to the Kimball Laundry Company $426,208.28, and that the proper measure of damages is the difference between said two, of $561,316.04; that there exists no accurate measure of evaluating these properties other than a showing, and that these are all in accordance with accepted principles of accounting in the laundry business.

Mr. Murphy: Petitioner objects to the offer for the same reasons as to the question.

The Court: Will you inform me, does the offer follow the discussion we have just had and present the questions for the record that were raised by his offer and by your objections thereto?

Mr. Murphy: I think it does. I think the offer is perhaps a little broader, going more into detail, but involving exactly the point in issue.

The Court: Is that so, Mr. Hotz?

Mr. Hotz: Yes, sir.

The Court: With that assurance of counsel, the court will not take time to have the offer read. Following the [fol. 183] rule heretofore made, the offer is refused and objection thereto is sustained.

Q. Do you have in mind any figure you can give us as to the—call it what you will—rental value, or temporary use—we can use the term temporary use of the property, by the government from November 22, 1942, let us say, until this time, the time of this trial?

Mr. Murphy: Objected to as irrelevant and immaterial; no proper foundation laid; too indefinite; and I have in mind particularly there is no foundation showing the items involved or covered by the question or the opinion requested of the witness, or the foundation or basis of his estimate.

The Court: I wouldn't say that, but the thing that bothers me is the term, under the taking, was through June 30, 1946, and they are still in possession of it.

Mr. Hotz: We will take it to June 30, 1946, because that is what now is of record.

The Court: That is when the possession expires. The right of the government to extend it, I take it, has been exterminated. Am I correct in that?

[fol. 184] Mr. Murphy: At this time you are correct. In the record, at this time, the right of possession expires June 30, 1946.

The Court: The government has no longer an option to extend it?

Mr. Murphy: Which is problematical whether it will be exercised.

The Court: The proceedings would be another action, an application for further action for continuation for further time.

Mr. Murphy: The same objection to the question as repeated.

The Court: Objection overruled, with the limit of time or term of occupancy.

Q. Do you understand we want now your figures that you consider agreeable for the temporary use of this property up to June 30, 1946, and I might say, do not include in that anything in reference to trade routes or loss of profits, because the court has passed upon that. Get your

figures down to something you can explain, after you give it.

The Court: Use, real estate, building and the machinery and materials therein, as taken by the writ of condemnation.

A. The total—

Q. Just a minute. That may include the damage that [fol. 185] has been done.

The Court: No, that is a separate item.

Mr. Hotz: I want it all in one, if I could get it, to begin with.

Mr. Murphy: I would prefer it all in one. We would have a duplication.

The Court: Very well, if it is the wish of counsel on both sides, there is no reason why the court should not go along.

Q. Include everything in it?

The Court: That is the fair market value of the use of the property as of November 22, 1942, through June 30, 1946, or three years, seven months, eight days, together with the damage which has been enumerated by the witness, added thereto, so that you may state it in one item. Is that what you are requesting, Mr. Murphy? Is that right?

Mr. Murphy: Yes.

Mr. Hotz: Yes.

The Court: In other words, what you want now is what he thinks the verdict of the jury should be for what he is entitled to under the ruling of the court.

A. So I understand the question, I am to give you [fol. 186] a lump sum figure of what we think we are entitled to for the use of that property from the time they took it, up until next June, 1946, including therein in this lump sum the damages we think have been incurred?

Q. And including taxes you will have to pay and everything else.

A. That is exclusive of these other things—a total of $570,000.00.

Mr. Hotz: That is all, I think.

The Court: If something else occurs to you, you may be privileged to ask the questions after cross-examination. Proceed with the cross-examination.

Cross-Examination of A. L. Jacobberger by Mr. Murphy:

Q. Let's take your figure $570,000.00. I presume you remember Exhibit 21. That is the machinery?

A. Yes, sir.

Q. And the difference between the two columns you have been asked about; that is, the value of all of that machinery as of November 22, 1942, and a recent date, was $153,131.54? A. The difference in the two?

Q. Am I correct in that? A. That is about right.

[fol. 187] Q. That covers all the machinery except the power plant equipment? A. Yes.

Q. Let's put that down. On the power plant equipment, and including the $5,000.00 item the court mentioned this morning with reference to some opening in a building wall, if my rapid computation is correct, you estimate your total damage to the power plant, including that wall and everything listed on Exhibit 23, as the difference between the two columns there, which would be $32,467.55? Is that correct?

A. No, that isn't exactly correct. It would be about thirty-two thousand, seven hundred and something, if you made the right deduction. It is this one from that.

Q. The correct figure now is what? A. $32,667.55.

Q. Then you, I believe, estimated this morning the cost of renovating the building and getting it back where it was in November, 1942, included painting, some new floors, that would be new instead of used, was $35,000.00?

A. Yes, sir.

Q. That covers all of the physical property, does it

[fol. 188] not? A. Yes, sir.

Q. Maybe you might be doing a little computation, but I think it will save time in the end—will you please check on this, Mr. Jacobberger? The first figure I have is the machinery, $153,131.54; then the boiler plant, boilers,

wall and so forth, $32,667.55; then on the building itself, $35,000.00. What is your total of all of those items?

A. Those three items, $220,799.09.

Q. Let us have some more detailed items that make up your $570,000.00, on which we are still something over $300,000.00 short. What other items do you have?

A. The remainder of the difference between this item and the $570,000.00 is what I feel we are entitled to for the use and occupancy of that plant in three years and seven months the army has been in there.

Q. On what do you base that figure, or your opinion of the value?

A. I base it on the fact that this was not a long time lease proposition, and based on my knowledge and talking with real estate men who are in the business of invest-
[fol. 189] ing money for the use of that kind that are rented, naturally, or return for this length of time, which should be in the neighborhood of $350,000.00.

Q. You still haven't been able to tell me anything specific that that is based on. Is that just a general grouping, or do you have any figures?

A. That is based, I feel, on the values as we have shown, including what I feel we are entitled to as a return on that property. We had it taken away three years and seven months.

Q. Let's simplify it a little bit and take it one year period at a time, and then we can multiply that. Did you include in that taxes, local taxes, that you pay?

A. How is that?

Q. In that three hundred some odd thousand dollars?

A. Yes.

Q. How much a year do these taxes amount to?

A. I am not sure of what they would run the last three years, because the property has been sold for tax sale.

Q. How much were they for any one year?

A. Prior to that time they used to run between $5,000.00
[fol. 190] and $6,000.00 a year, just for real estate taxes.

Q. Let's take $6,000.00 a year. Do you have some insurance for the protection of your property, insurance premiums?

A. Yes, fire and the usual coverage of insurance.

Q. Do you know approximately the annual premium cost on that?

A. I think all forms of that type of insurance run somewhere in the neighborhood of $1,000.00 a year.

Q. That included some liability you didn't have to have while you were out?

A. That included all forms of insurance in connection with the building and property.

Q. We will take that figure, $1,000.00 a year, for insurance premiums. Does that figure include depreciation on the machinery and buildings; the three hundred some odd thousand dollars?

A. That includes normal depreciation, based on the way we operate it.

Q. Let's take that for just a moment. You operated a laundry down there for eighteen years before the army went in, didn't you? A. Yes.

Q. You used that building for laundry purposes for that period of eighteen years?

[fol. 191] A. Parts of it, yes.

Q. You had a big laundry, a large capacity down there?

A. Yes.

Q. And you bought machinery and wore out machinery during that eighteen years and had to replace it with new, didn't you? A. I won't say we wore it out.

Q. You discarded some and replaced it, didn't you?

A. Yes, discarded some.

Q. And you used some of this machinery down there for eighteen years, didn't you? A. Some of it, yes.

Q. And, of course, used the whole building and power plant for eighteen years?

A. Not the entire building. Three floors of it for the first approximately eight years, and then we expanded on the fourth floor. The fourth floor, when it was built, was not even used, and in 1935 we put on the fifth floor and expanded into that.

Q. And you have used that ever since? A. Yes.

Q. And used, of course, the boilers all of those eighteen years? A. Yes.

Q. Both of these boilers were put in there when that [fol. 192] building was constructed?

A. With this exception, again: One boiler was used in the summer months, for about five to six or eight months, and the other boiler in the winter, so we can say half of that time, nine years apiece, but we didn't use both boilers at the same time.

Q. But they were both down there and installed for eighteen years? A. Yes.

Q. And you operated this Kimball Laundry Company nine hours a day? A. Yes.

Q. And you remained on when the army went in there as superintendent? A. Of the plant, yes, sir.

Q. And you remained on there charged with the duty of overseeing the operation of that laundry?

A. The operations of the quartermaster end of it, the production of it.

Q. The difference is you were doing laundry for soldiers and the army hospitals, rather than civilians?

A. That was part of the difference.

Q. And it was part of your job to keep up and maintain the premises, wasn't it?

[fol. 193] A. No, sir.

Q. Didn't you have anything to do with that? A. No.

Q. What was your job?

A. My job was superintendent, to see that the production of the floor work was coming in to the plant, and maintained the service that was required of us.

Q. And that was done? A. That was done.

Q. You were paid by the government for doing that?

A. That is right.

Q. And you occupied, and continue to occupy the same office you had before the army went in there? A. Yes, sir.

Q. You spoke something yesterday about what you had down there in the past. You had offices. Those offices

are still there, aren't they, except that they have made a couple of changes of partitions in a couple of them?

A. Yes, the offices themselves are still there.

Q. And you said something yesterday about having a kitchen and dining room up there to feed two hundred employees. As a matter of fact, you didn't mean to infer or state to the jury it was big enough to feed two [fol. 194] hundred employees at once, did you?

A. Oh, no. I mean that is how many we fed altogether.

Q. That kitchen and dining room—

A. The seating capacity is about sixty at a time.

Q. Forty-eight at the tables, isn't it?

A. That is how many chairs are there now. There might have been sixty before.

Q. The kitchen and kitchen utensils, and dining room and dining room facilities are still there and still being used? A. Not the same ones, no.

Q. What difference is there?

A. The steam table that was in there has been destroyed and another one put in its place. The refrigerator that was there is gone and there is another one in its place.

Q. There is another in its place?

A. Yes, ones they substituted.

Q. The stoves are there and cooking utensils and tables and chairs and the present employees use them just the same as the Kimball Laundry did when it was in possession, don't they? A. Yes.

Q. You spoke this morning, I think, about various [fol. 195] items, one of which some—what do you call them where the water drains down? A. Gutters.

Q. Gutters, yes, and that water has seeped through those gutters? A. In places.

Q. Those gutters are just concrete gutters, not concrete construction?

A. No, that isn't the right description of them. The gutters themselves, that is, the construction of the gutters is set in the concrete and covered with this rock as-

phalt as a protective surface about an inch and a half waterproof between that.

Q. And they were put in there when the building was constructed? A. Originally, yes.

Q. And their purpose was to carry off water from your laundry tubs? A. To the sewer, right.

Q. And they served that purpose for eighteen years before the army went in there?

A. Not without having been repaired.

Q. You had to repair them when you went in there, didn't you? A. Yes.

[fol. 196] Q. How much depreciation in this figure of three hundred and some odd thousand dollars?

A. That is the difference between this $220,000,00 and $750,000.00 odd dollars we are talking about?

Q. Yes.

A. Included in that would be normal depreciation that we were based on for tax purposes.

Q. What is that percentage?

A. It varies in various departments. Anywhere from five and three quarters per cent to approximately 2.3% on the building, to 10% on some items.

Q. Let's get that a little more slowly. What is the per cent you have included as to the building itself?

A. Normal depreciation, two per cent.

Q. Is that the figure you have used in this computation? A. Yes.

Q. What per cent of depreciation per annum did you use in this computation as to the laundry machinery?

A. Normal depreciation on the whole laundry equipment was around five and three-quarters per cent.

Q. Is that the figure you used? A. Yes.

Q. Five and three-quarters per cent per annum?

A. Yes.

Q. What percentage of depreciation as to the boiler [fol. 197] plant did you use in this computation arriving at this figure?

A. On the same rate, I think, of about five per cent. Understand, I base it on our operations on our hours.

Q. I am not asking you what you base it on. I want to get the basis for your three-hundred some odd thousand dollar figure and I want to know what you have included in that.

A. Some laundry and dry cleaning equipment was depreciated at the rate of ten per cent.

Q. You claim down there to have had, I think, when the army went in there, laundry machinery valued at $273,000.00 in round figures? A. Yes.

Q. How much of that was depreciated at ten per cent per annum in your figures? A. I couldn't pick it out.

Q. I don't mean exact items. I mean a rough proportion of them? A. Oh, perhaps twenty per cent of it.

Q. Roughly, that would be around fifty to fifty-five thousand dollars worth of this laundry machinery that you had depreciated, and would depreciate, in your figures, at ten per cent per annum?

[fol. 198] A. Yes.

Q. In our three hundred some odd thousand dollar figure we have taxes, insurance, depreciation on the building, machinery, power plant. What else would you include in there?

A. Such as expense as we have been put to.

Q. What expense? A. During the past three years?

Q. Yes.

A. Expense of additional expense that we have been put to as a result of the taking of our business.

Q. What item of expense?

A. There are many different items.

Q. Give us some of them.

A. Some of it was due to additional—

Q. I didn't ask you what they were due to. I asked what the expense items were.

A. Some of them were storage. We were forced to store some of the items we had to take out of the building, of our own customers' clothing which we had to remove out of the building and find a place to keep them while they were taken away from the plant.

Q. What else?

A. Storage of trucks and automobiles that we had [fol. 199] to put away somewhere and couldn't be used, and then put through the expense of certain items of litigation during the last three years.

Q. You have included all of these items in this figure we are talking about? A. Yes.

Q. How much do these items total you are now discussing, storage, litigation expense, and those matters?

A. Including depreciation?

Q. No.

A. I couldn't give you the honest figure now. I would have to go to our books.

Q. Go to your books. We want to have the details on them.

The Court: Suppose we stop at this time and take our afternoon recess and give you men time and you can find the items, and if not, we will give you time to get them later.

(Court adjourned for recess.)

Q. Did you have an opportunity during recess to determine how much of a figure you had included, and pertaining to the items we were last discussing, storage of various things and litigation?

A. Storage expense in this period up to last November was around $5,400.00.

[fol. 200] Q. Was that on clothing and trucks?

A. That is the entire amount, yes.

Q. How much litigation expense did you have charged there?

A. I haven't any in there yet. I have an expense of truck reconditioning which will be necessary—

Q. Never mind why it is necessary. Tell us what it is. A. Around $3,000.00.

Q. And that is automobile trucks? A. Yes, sir.

Q. And the government did not take any of those automobile trucks? A. No.

Q. What else do you have?

A. We have been put to, as a result of this thing in appraisals and audits and matters of that kind, expense

that runs in the neighborhood of $8,000.00 or $9,000.00 up to last November.

Q. That is appraisals and audits in connection with litigation? A. Yes, the entire taking of the plant.

Q. Anything else?

Mr. Hotz: Taxes.

The Witness: I think he has the taxes.

Q. I believe we have your valuation on the laundry [fol. 201] machinery at the time of the taking of $273,831.39, is that correct? A. That is right.

Q. To be fair with you, what I am getting is the total valuation of the physical plant at that time and your figure on the valuation of the boiler plant at that time was $62,928.08, is that correct? A. That is right.

Q. These are your figures, aren't they? A. Yes.

Q. And your figure on the valuation of the raw land, I believe you stated this morning, was $30,000.00 as of November, 1942? A. Yes.

Q. The building proper we don't seem to have any figure of valuation as of that date. I will hand you just for your recollection and reference—examine it—a letter—

A. Getting back to the total itemized expenses, you were putting down taxes and things like that—there are other considerations that you didn't ask for that I haven't given you.

Q. I will come back to those. In fairness, I think it would be proper to remind me. I want to get your figure on the valuation of the building itself as of November, [fol. 202] 1942. Can you give me that?

A. Value of the building alone without the plant or machinery?

Q. That is right. A. Yes.

Q. What figure? A. It is billed at $280,000.00.

Q. Just a moment. You are taking that figure from Exhibit 19, aren't you? A. That is right.

Q. And if you will read that, or note it, that being Mr. Latenser's figures, that is the reproduction cost of the new building in November, 1942, not the value then of the present building?

A. That is the value of the present building to us at that time.

Q. I am not asking you the value to you at that time. I am asking for the market value of the building as it was in November, 1942, and not the reproduction cost of a new building as of that date?

A. There were no offers made so there can be no determination as to the market value. I have to assume, and I do assume these are true values of $280,000.00 at that time. That is what it was worth at that time to the Kimball Laundry Company.

[fol. 203] The Court: You adopt that figure as the fair market value? A. Yes, sir.

The Court: Pass that on.

Q. I have one more question. As a matter of fact, it was the opinion of yourself and Mr. Harry Jacobberger, in January of 1943, that the building value as of November 22, 1942, was $177,976.50?

Mr. Hotz: Just a moment. Let me see what is going on here. I object to this for the reason and on the grounds that the questions are being proposed to the witness from a letter that was dated January 18, 1943, when an effort was being made to settle this matter.

The Court: He hasn't offered the letter in evidence.

Mr. Hotz: He has called his attention to—

The Court: This is cross-examination and you can straighten it out later, if you can. He can ask leading questions and that sort of thing on cross-examination.

Q. Isn't that a fact, that that was your opinion in January, 1943, that the value of the building was $177,976.50?

A. I would have to see that letter. In the first place, [fol. 204] my signature doesn't accompany this.

Q. I am merely asking you if that isn't a fact, if that wasn't your opinion at that time?

A. And that is prior to the time that we had an opportunity to find out the market value, or value of that building to us. One was January and another was taking it at a later date.

The Court: At that time you were not as well advised as you are now?

A. That is correct.

The Court: That explains it from your standpoint. Pass it on.

Q. Let me get at it this way: Your own figures show the total cost of that building when it was constructed was one hundred ninety-nine some odd dollars, is that true?

A. That is the original cost of part of the building.

Q. That is what I mean, in 1924.

A. Before it was all complete.

Q. That is right. I will get to that. In 1935 you had a story added at the cost of some thirty-three thousand dollars? A. That is right.

Q. So that the cost of the entire building as shown [fol. 205] by your Exhibit 19 was two hundred thirty-three and some odd thousand dollars, is that correct?

A. That was the cost on our books of the building at that time, yes.

Q. Not just the cost on the books. It is what the building cost, isn't it? A. Yes.

Q. And that building, except for the fifth story, had been standing there and used for eighteen years before the army took it over?

A. Part of the building had been standing for eighteen years prior to the army taking it over. Building values appreciated.

Q. Please just answer my question. All of that building except the fifth floor had been there, and except for one or two floors for a few years, had been in use for eighteen years before the army took over? A. Yes.

Q. That, and the newly constructed fifth floor having been there and in use since approximately 1935, until the army took over? A. That is right.

Q. The building is still there subject to this $35,000.00 need of repairs and renovating? A. Yes, sir.

[fol. 206] Q. $120,000.00 worth of machinery is still there?

A. According to that exhibit, yes, sir.

Q. $30,000.00 worth of land is still there? A. Yes.

Q. Some thirty thousand dollars worth of boiler equipment is still there? A. Yes.

Q. And the entire value of the entire plant, the items I have just mentioned, taking your own figures and taking the building figure at $280,000.00 is $646.759.00. You might check that so that we will not have any error.

A. That is for the land, building, machinery and power equipment—that is about right.

Q. $646.000.00? A. Yes.

Q. And the army used it for three years and seven months and some days, and you still want to tell this jury you think the government, with the buildings still there, this machinery I have mentioned still there, part of the power plant still there, and the land still there, should pay you some $570,000.00? A. I certainly do.

[fol. 207] Q. I had some of these figures computed, and of course, this is subject to your checking over the evening recess, but taking all of this cost of replacing the building, power plant and machinery back where it was—

The Court: He referred to some other items that you should probably give him a chance to tell about. Take him back before you ask your next question.

Q. You suggested a while ago there was some other item you wanted to include in the general expense, I think? A. Yes.

Q. What was that?

A. It was the item which I can only make an attempt at a round figure, but which is there nevertheless, but from the date, whenever that is, that the army turns back what is left down there in the way of building and machinery, and the condition it is in, from that day on until the date we can again be in operation—

Q. Let's stop there a moment. You have included in this $570,000.00 some figure covering that period of time? A. Yes, I have.

[fol. 208] Q. How much? A. That difference between—

Q. What is that figure?

A. As I say, it is impossible to give it accurately, but I will say around $75,000.00 in that total, around $50,000.00 to $75,000.00 in that total difference between damages to the physical structure and what we ask for, that figure is in there.

Q. Something that is going to occur after you get back in possession?

A. It will take four to five months—maybe six months—

Q. Just a moment—

Mr. Hotz: I think the witness should be allowed to answer. He is shutting him off. Nobody can tell what the witness is trying to say.

The Court: What is the objection?

Mr. Hotz: The objection is, let the witness answer the question in full before he is interrupted by counsel.

The Court: I think he is trying to do that. Is there anything further you wish to say, Mr. Jacobberger, in answer, to Mr. Murphy's question?

A. I want to bring out the fact that from the time the army turns the building back to us, the building and [fol. 209] equipment, in the condition it is in, from that time until the date we will be able to start, we have the problem again—we will be out of business—we will have an expense going on during that period, and that period of time will be no less than four to six months time when we will be sitting there preparing to again resume operations.

Mr. Murphy: If the court please, I move to strike the last statement of the witness, and also his testimony as to the figure of $570,000.00, as including and covering noncompensable items and business after and beyond—

The Court: I think we will handle all these items all together when we get them assembled and we will take your motion under advisement until we get it in proper order. We have these items spread throughout the record for many pages now and we had better keep it clear,

what your motion reaches or what ruling you wish from the court.

Q. Going back a moment, and if I may be repeating to be sure we understand each other, the items of repair and renovating of the machinery, power plant and building total $220,799.00; the tax and insurance item, taking your figures per year and multiplying for three years [fol. 210] and seven months and some days, amount to $24,081.00.

A. Mr. Murphy, you are multiplying by three?

Q. No, three years and seven months, a little more than three years and a half—and the miscellaneous expense items, which you gave, and which are not annual, I take it, but are totals on those?

A. Up to that date they were the storage.

Q. They totaled approximately $16,400.00; then the depreciation taken and the percentage you gave and the values you gave and figuring them over the full period of three years and seven months and some days, which is in addition to the expense of restoring and renovating, which we have mentioned before, is $96,129.00. All of these are subject to minor correction.

A. I would like to check them.

Q. And the last figure you mentioned is $70,000.00, to $75,000.00—

A. I said $50,000.00 to $75,000.00. Somewhere in that neighborhood.

Q. I have taken the $75,000.00. All of those items total $433,409.00, so we are still short approximately $137,000.00 of your $570,000.00 figure. What makes up that additional $130,000.00 some odd thousand dollars?

[fol. 211] A. That would be the return to the owners for the use of this property—their net due the owners for the three years and seven months.

Q. Do you mean the return on your investment?

A. I say the amount of money we are entitled to for the use of that total plant for those three years and seven months.

Q. How do you arrive at it?

Mr. Hotz: Just a minute. I object to that on the ground it is an improper question. The witness is not required to state upon what basis.

The Court: Overruled. It is cross-examination. How did you arrive at the figure, is what he is trying to get at? What are the elements? What do you consider?

A. That is based on the investment and land, building, machinery, power equipment.

Q. And what annual per cent of return on that valuation do you use in computing that figure?

A. Around the neighborhood of ten per cent.

Q. Ten per cent per annum return on your capital investment in these four items; land, laundry machines, power plant and building?

A. Yes, ten per cent net.

The Court: You figure that would be a fair rental [fol. 212] without any damage or ordinary depreciation?

A. That is net figure, Your Honor.

Q. Did I understand it to be your claim that even though full payment is made for all loss of value of the machinery, full payment is made for all loss of value in the power plant, full renovation is made to the building, getting all of those items back on a value equal or better than it was in November, 1942, that over and above all of that you still include in your figure a depreciation item which I figured at some nine-six thousand dollars? Is that your claim?

A. Yes. I would like to explain that, if I may.

The Court: Go ahead.

A. You are talking about depreciation. I can't explain it without going into some detail. In the operations of the Kimball Laundry Company, each year there was an expense item, an expense for the repair and upkeep of the building and all equipment that was a deduction by operational expense. That took care of the wear and tear of the equipment and the building as it was used in the operations of the Kimball Laundry

Company. The depreciation was a net amount of money that was there for the owners to take and do with as [fol. 213] they wished. Normally it is used to replace, or used in going out and purchasing new machinery. It is very often used in many businesses for other purposes, and very often if they use it for other purposes, they may go to the bank and borrow money to buy new equipment, but the depreciation is a net figure to the owners as a return on the investment on a depreciation basis and has nothing to do with repair and upkeep of the equipment whatsoever, because that money is spent each year directly out of operational expenses for that business.

Q. In other words, that is a profit from the business?

A. It can be termed as such. It belongs to the owner and he can do as he wishes with it.

Q. You are adding that on top of all these repairs and renovating costs and taxes and insurance and miscellaneous expense, and on top of a ten per cent return on the investment? A. Yes, sir.

Q. Let's go to the building a moment—by the way, this five-story building that carries on, and has this great laundry capacity, has but one elevator, doesn't it?

A. Yes.

[fol. 214] Q. All passenger service up and down by the workmen and all laundry and cleaning going in and out must go up and down on that one elevator?

A. In going out we have a chute properly built for the returning of the finished laundry work to the shipping room. Some of it goes up in there, yes.

Q. This figure of $35,000.00 is a complete repaint job, isn't it?

A. Yes, it includes repainting the entire building and painting the steel. All the items I enumerated this morning, Mr. Harry Jacobberger has the figure that includes all of that.

Q. And it included laying new mastic flooring?

A. Included laying new rock asphalt covering in the washrooms where needed.

Q. Where are the washrooms?

A. And the final putting into the original condition of the mastic flooring throughout the building wherever it is not in good condition. As a matter of fact, two months before the army took over, I spent $3,000.00 putting those mastic floors in A-No. 1 condition. Every floor was in A-No. 1 condition.

Q. And when this $35,000.00 job is done they will be [fol. 215] again in A-No. 1 condition?

A. So far as I know.

Q. And that is true as to all these other items of repair you have included in this $35,000.00 item?

A. That $35,000.00, it may be more than that—yes—yes.

Q. And still, on top of that, you want depreciation on the building?

A. Yes, sir. I don't want anything we haven't already taken in the operations of our building—that we had and that we are entitled to.

Q. During all this time the army has occupied and used the premises in question, they have made repairs, have they not?

A. They have made some repairs. You are talking about the building now, or machinery, or what?

Q. I am talking about, primarily, laundry machinery and perhaps power plant?

A. They have made, some repairs.

Q. They have spent over $35,000.00.

A. They call them emergency repairs, though.

Q. Whether emergency or not, they spent over $35,000.00 to your knowledge?

A. They had to do it to keep the thing operating.

Q. They kept it operating, didn't they?

[fol. 216] A. Yes, they did.

Q. And did a good job?

A. I think we did a good job, yes.

Q. And continue to do that? A. Sure.

Q. Taking Exhibit Number 25, Mr. Jacobberger, which shows your building, I wish you would point out to me on there where any points of damage are that you have told us about.

A. On the outside of the building?

Q. Yes.

A. It is quite hard to show, but I will try. This sidewalk on this area in back, this is quite a wide sidewalk, and particularly from this shipping room—rather these windows were removed by the army to unload, and from about here on clear to the alley that sidewalk is well destroyed. There is a steel cover here, or what we call an areaway to our basement.

Q. That is in the sidewalk?

A. In the sidewalk it is, yes; particularly on this trim here, this terra cotta trim, where these trucks back up, that has been quite badly damaged.

Q. To how many windows does that apply?

A. In this particular area to about the third window [fol. 217] base here, and you have a door framing on this side. This was a door.

Q. Your repair involves replacing that terra cotta and that sidewalk and things of that sort?

A. We are just talking about the outside of the building?

Q. Yes.

A. Then, there are places where terra cotta has dropped off, the face of it has dropped off, and finally, because it happened in various places, they stretched a rope around the building so that pedestrians would not get hurt from the dropping debris from the building. It was vibration in the building caused by the improper operations and loading of extractors we were operating—

Q. Does that picture show any of that on the upper floors? A. Does it show any damage?

Q. Yes.

A. No, this doesn't. This picture is taken before.

Q. Right now, one standing on the sidewalk down there and looking at the building, it still looks just like that, doesn't it?

A. In the whole appearance. I mean it is still five stories.

[fol. 218] Q. I mean the whole general structure. You can't see that terra cotta damage? A. Yes.

Q. You have to look at it pretty carefully, don't you?

A. No, you can stand right here on the sidewalk and see it very easy.

Q. But the whole general picture is the same as that?

A. From this side, yes, it is the same appearance.

Q. And your $35,000.00 item includes the replacement of any of those things that have fallen off or been knocked off? A. Yes, I have.

Q. So, it would be back in first-class condition when that is done? A. Yes, sir.

Q. I have asked you before about the operation of this large laundry by Kimball Laundry Company prior to November, 1942; and except for that third and fourth floors, the operation was continued over this eighteen years, wasn't it? A. Fourth and fifth.

Q. I beg your pardon, fourth and fifth. And now I want to hand you Exhibit 24 a photostatic copy. How many shirts did you run through that laundry in the [fol. 219] last year covered by that exhibit?

A. In 1941, 665,357.

Q. What is the next heading there?

A. The next one is on curtains.

Q. I don't think we are particularly concerned with curtains. A. The one after that is blankets.

Q. You used blanket machinery for army purposes?

A. Yes.

Q. How many blankets did you run through that plant in 1941? A. 4473.

Q. What is the next column?

A. Here is the total of all of these columns. Wouldn't that be better?

Q. Thanks for the help. Will you look at a figure you have in that exhibit in the bottom line? That is a total of pounds of a number of operations. What is that total?

Mr. Hotz: I object to that as being incompetent, irrelevant and immaterial. The witness is on the stand apparently at the present time to be cross-examined by counsel in connection with his estimate of the fair value of the use of that property and he is now examining [fol. 220] him in connection with something that has to do with operations and profits.

The Court: This was received in evidence showing the capacity. Now, then, he has the right to cross-examine on anything you have produced here and have succeeded in getting before the jury. Overruled.

Q. What is that figure?

A. This is merely a guide of some of the work we did. I want to qualify my answer. The figure is 2,826,572.

Q. What is that?

A. That is the total pounds of five different services that we had to offer out of our total number of services.

Q. And over what period of time?

A. That is the period of one year, 1941.

Q. So, in the year 1941, and not including all work that went through the capacity of that laundry, your Kimball's operation, there were nearly three million pounds of those items listed on Exhibit 24?

A. That is right.

Q. And they went through the machinery down there?

A. Yes, sir.

[fol. 221] Q. And, of course, water and steam and boilers were used in doing that work? A. Yes, sir.

Q. And had been used for eighteen years, except for such new machinery that was purchased and new additions in the building during that time? A. Yes, sir.

Q. All before the army ever took possession of that plant? A. Yes.

Mr. Murphy: It is a bit early, but I have a lot of figures and we can save much time if we can adjourn at this time and compile them in better shape.

Court adjourned until March 7, 1946, at which time, Mr. Murphy continued his cross-examination of Mr. A. L. Jacobberger.

March 7, 1946.

Q. Mr. Jacobberger, I will hand you Exhibit 21, which is the list of laundry machinery, and at the left-hand side on the various pages, I note in some instances a yearly date. If you will turn to Item 133, in the left-hand column, I note the year 1942. Do you find that?

A. Item 135?

[fol. 222] Q. No, Item 133? A. Yes.

Q. Does that indicate that that particular item was purchased in 1942, prior to November, I take it?

A. I would imagine so. We didn't make up this report and I didn't supply that information as to that time, so I couldn't give you that.

Q. Turn to the next page, page 7, Items 159 and 160. Do you know that those two items were purchased in 1942?

A. I couldn't say. As I say, again, I didn't furnish this information for this report.

The Court: Couldn't you find the gentleman who knows something about it and go on with something else?

Mr. Murphy: I will ask only one more, which I think he might know personally.

Q. Page 8, Item 168, 1940. Do you remember personally that particular item?

A. Well, I remember, yes. That was one of the latest installations of pressing equipment. It was installed about that time. I think 1940 is right on that.

Q. Did that replace some less desirable equipment?

A. That replaced some and supplemented others. In [fol. 223] other words, added to.

Q. Yesterday we had some discussion, and I don't recall that I got a direct answer, and subject to your ex-

planation and right of further explanation, if you so desire, I merely wish to ask you if the Kimball Laundry Company, through its officers, of which you were one, did not state on January 18, 1943, that the value of the building was $177,976.50?

Mr. Hotz: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. Just answer "Yes" or "No," if you will, please, first.

A. The question is whether this figure, this amount of $177,976.50, was our figure as to the value of the building?

Q. Whether you stated at that time that was your figure?

A. That value was estimated—taken off our—

Q. That isn't answering my question.

A. It is in this letter, Mr. Murphy. Yes.

Q. And in the same letter, you stated the value of the land was $19,800.00, is that not correct?

Mr. Hotz: Object to that as incompetent, irrelevant [fol. 224] and immaterial, the witness not having stated yesterday that his name appeared in the letter. He didn't write the letter.

The Court: That is not the question. Overruled. This is cross-examination. This is testimony now given as to the value of the property when it was taken. The question is: Did you state at that time the value was $19,000.00 instead of $30,000.00?

A. That is not my signature and I don't pretend to have anything to do with making up these figures.

Q. You know that is the signature of Mr. Harry A. Jacobberger, do you not?

A. That is right; that is his signature.

Q. And signed as president of the Kimball Laundry Company, is it not? A. Yes.

Q. You were also an officer of that company, were you not? A. I was.

Q. You have testified here to certain values as one of the owners of that property, have you not? A. I have.

Q. Now, will you answer my question as to whether [fol. 225] or not the Kimball Laundry Company did not state on January 18, 1943, that the value of this land was $19,800.00?

Mr. Hotz: Object to that as not a proper question to put to the witness; not proper cross-examination.

The Court: What is the matter with it?

Mr. Hotz: He has given the witness a letter, apparently in which a certain figure is fixed that the witness didn't write it. What does the court, or what do any of us know, as to the other qualifications in connection with it? As a matter of fact, it was a letter that was a compromise, a settlement offer that took in a great many things.

The Court: You can show that. What is the matter with this? Here is a letter he identifies as the letter of the Kimball Laundry.

The Witness: One thing is, it was in connection with the settlement, as I stated yesterday.

The Court: Objection overruled.

A. The amount stated in here is the amount, value at that time, as this letter was written, was $19,800.00. Yes, sir.

Q. And in the same letter, and at the same time, [fol. 226] the value of the machinery and equipment, including both the laundry equipment and machinery, and power plant machinery and equipment, was stated as $329,567.02, was it not?

A. That is the figure in this letter, yes. It doesn't say anything about power equipment, I don't believe. I think it just says machinery and equipment.

Q. There is no separate listing or mention of any power machinery or equipment in that letter, is there?

A. I don't see that, no.

Q. And in the same letter, and at the same time, did not the Kimball Laundry Company state that the total

value of the entire physical plant, building, machinery and equipment, was $527,343.52?

Mr. Hotz: Object to that for the same reason, the witness testifying from a document not in evidence.

The Court: Overruled.

A. That is the figure in here.

Q. The item of taxes and insurance are, of course, a continuing expense over the three-year period, plus, are they not? That is, every year there are taxes and insurance?

[fol. 227] A. Yes.

Q. The same is true of depreciation, it is continuing from each year? A. Yes.

Q. A return on investment, of course, is an annual thing, according to practice, is it not? A. That is right.

Q. Taking your figures of yesterday on taxes and insurance per annum and multiply them by 3.6, which is quite accurate, three years, seven months and eight days, I get the figure $25,200.00, and depreciation from your figures, and multiplied out on the same basis, $96,585.00 return on investment—we arrived at that in the final figure—I think I said in my question $137,000.00—it is really $136,016.00, subject to a little variation on some of these other figures, the total $257,801.00, covering the full period of time, three years, seven months and eight days; then again reducing them down to a per annum, those being the figures, as I understand it, that entered into the rental, as distinguished from these lump sum single figures of damage and so forth, figures an annual rental of $71,611.39. Am I correct in that? Is that approximately your annual rental valuation?

[fol. 228] A. $71,000.00, did you say?

Q. Yes. A. No, that isn't.

Q. What is?

A. Our over-all rental for the three years and seven or six months, based on the fact that the army or anyone else would have come in and that that building and machinery, as it sat there, equipped, ready to operate, with the employees in place and everything ready—we step

out and they step in—is $350,000.00, to our best knowledge and judgment, for the use of it for the time they have had it, and the figures you are bringing up have to do with—maybe some of that money would have to be spent—but for the use of that building, not only to the government, but to anyone else, we feel is worth $100,000.00 a year, taking it as it sat there ready to step in and operate the very next day.

Q. I have taken your own figure $570,000.00—

The Court: Suppose you give Mr. Jacobberger a copy of your statements so that he can know better what you are talking about.

Q. Let's start right at the beginning and see if I have made any errors, and having in mind your total claim, [fol. 229] as you state, of $570,000.00. In that I understood you include the difference in value in the laundry machinery, $153,131.54? A. That is right.

Q. And a difference in value of the power plant, boiler equipment, of $32,667.55? A. That is correct.

Q. On the paper there is a difference in value of the building, or you may have used it the other way, cost of building—anyway, the amount was $35,000.?

A. That is right.

Q. Those items total $220,799.09, do they not?

A. That is correct.

Q. Now, the taxes and insurance were $7,000.00 a year, I believe you stated $6,000.00 taxes and $1,000.00 insurance, and multiplied out over the full term would be $25,200.00. You can do some rapid calculation, if you wish, to check.

A. For round figures, that is probably what the taxes and insurance amounted to.

Q. You have estimated your depreciation on the building at two per cent, which amounts, by your figures, to $20,160.00?

A. I have estimated those. I merely gave you those figures. You asked for them yesterday, based on what [fol. 230] we had been taking in the way of depreciation. That was what, for tax purposes, we had been allowed by

the income tax department on our books. That has nothing to do with my figure, the sum of $350,000.00.

Q. Let's see whether it has or not. You take a depreciation on your income tax, do you not?

A. We take a depreciation on building and equipment for income tax purposes, which is allowed by the tax department, yes. It is an arbitrary figure that they allow.

Q. It is a per cent credit, a benefit to you, is it not, whatever it is?

A. Whatever the amount so set up on the books is, yes, that is a return to us.

Q. And you reduce your net income proportionately, do you not? A. Yes.

Q. And you don't pay the government any income tax on whatever amount you charge off as depreciation, do you? A. No, we don't.

Q. So, in dealing with the government on income tax you use one figure for depreciation, and do I understand in dealing with the government on another matter, in- [fol. 231] volving exactly the same problem and property, you want to change and have a different basis of depreciation?

A. In answering that question, there are two kinds of depreciation, that is true. There is one fixed by the income tax department that they allow for tax purposes, allowing an investor or owner to depreciate his investment at whatever that figure may be. That has nothing to do whatsoever with the actual depreciation of a piece of equipment. I might purchase a piece of equipment ten years ago for $5,000.00, and for all intents and purposes, the government income tax department might allow me to depreciate that at the rate of ten per cent a year for income tax purposes, only, but so far as that machine is concerned, if it has been properly kept up in repair, the value is just as good today, five years later, as the time we put it in.

Q. I am still waiting for an answer to my question, whether or not you use two different figures in the two instances?

Mr. Hotz: I object to that. The witness has made a fair explanation.

The Court: Overruled.

[fol. 232] A. I want to clear this up. Maybe I don't understand you. These figures I gave you yesterday are entirely based on what we had previously been allowed to take for income tax.

The Court: In making your estimate you figured a different rate, is that it?

A. Yes. Actual depreciation on equipment and depreciation allowed for income tax purposes are two different things.

Q. That is all I am asking you, Mr. Jacobberger, and you have used two different figures in the two instances, that is correct, is it not?

A. Not according to this report, no. I gave you merely the depreciation that I said was customary to take for income tax purposes.

Q. I have your own figures on this $570,000.00 item. If I have mistaken them or misread them in any way, straighten me out.

A. Let me explain that in my own way. I come to the top figure, which is $220,000.00 some odd thousand dollars, and we will say that is for money that will be spent in repairs and putting that plant back into shape physically; then we say, over and above that there is a figure of $350,000.00. That is what it is going to amount [fol. 233] to. $350,000.00 and $220,000.00 is roughly $570,000.00—

Q. Mr. Jacobberger—

The Court: Let the witness finish.

A. So, the $350,000.00, in our contention, is what that building and land and machinery was worth in the way of temporary use for the three years and a half that the government has had it, in the fact that they were able to step into that place and operate it the very next day, have the employees there, have the machinery there, everything geared up, steam in the boiler ready to go, and there was no loss of time, and we say it was worth

to us, the owners, $100,000.00 a year, based on what we think we were entitled to.

Q. I am finally getting an answer to my original question. Your rental value is $100,000.00?

A. Not rental, but for the use of the building.

Q. I beg your pardon—for the use of it is $100,000.00 a year? A. That is right.

Q. What do you include?

The Court: Let me understand. Is that the use of the building? That is the use of the property, as I understand it?

[fol. 234] A. The property. The land, building and machinery.

Q. Now I wish you would tell me how you arrived at that $100,000.00 in figures. By that I mean, what items go to make up that figure?

Mr. Hotz: We object to that as not proper cross-examination on the subject. If the witness gives the estimated fair valuation, it may take into consideration values, but not what he is going to do with the money after he gets it.

The Court: He may say it is an arbitrary figure he put on there, or it is a figure they arrived at by considering different elements. Mr. Murphy is asking him which it is and he should tell us. If it is an arbitrary figure, why then that closes it, but if it is a figure arrived at through prospect of the rental to someone or to a lessor, or someone who desired it to lease, or if it is a combination of both, let's have it. It is proper cross-examination how he arrived at the figure. These are problems the jury must arrive at from all of the evidence.

Mr. Hotz: To further add to my objection: If it is a combination of the both, it is all right, but if I understand the line of cross-examination, he is going to try [fol. 235] to have this witness testify as to every dime of the $359,000.00.

The Court: He has a right to do that as proper cross-examination and you have a right to show every nickel

you have coming, and I will give you all the time you need.

Question read.

A. The figure is based, as I tried to explain, on what we, the owners, felt it was worth to us.

Q. Worth to you?

A. To have that taken, as in this case it was taken, or if we would have leased it out to anyone else on a year to year basis— that is how we determine what that figure is. Sure, we took in the elements of the fact we had to pay out money out of that $100,000.00. We had to pay the insurance and taxes and we were entitled to our depreciation, and we certainly were entitled to something for the return on that investment, having had it taken away from us, not by any willingness on our part, but taken away from us; certainly the figure that was placed on there was too small.

Q. Can you substantiate that figure of $100,000.00 annual use value? A. In our own minds, yes.

Q. Pardon me, in your own minds, you say, but I [fol. 236] want specific figures on the very elements you have just mentioned, these taxes, depreciation, return on investment? A. Yes.

Q. You can give me those figures?

A. In other words, you want me to tell you how I am going to spend that money?

Q. No, sir. Let me put it to you this way: Will you again examine the statement you have in your hands and I will ask you if that statement, subject to any errors of arithmetic which may be corrected, if there are any, whether that statement does not correctly reflect your testimony yesterday, compiled down in a composite statement form?

A. The $220,000.00—I merely gave you these figures, depreciation, like on the building, two per cent, and some equipment ten and some equipment five and three-quarters per cent, and you total them up, and that reads ninety-six some odd thousand dollars—and then you have entered some other items of how we are going to spend some of

this money, and have spent some of it, what we had to spend for storage and litigation and truck reconditioning, another $16,000.00—

Q. That was your testimony, wasn't it?

[fol. 237] A. Yes, I gave that testimony, sure. Yes, these are the very things we were talking about.

Q. Those figures are your testimony of yesterday, are they not?

A. But these figures, I want to get over to you, are merely on the question of what we are going to do with that $350,000.00, how we are going to spend it. That has nothing to do with how we arrived at it, necessarily. It probably will take a good deal more than that.

Q. You have answered the question. I have just had the Reporter mark the original of that statement we have been discussing, you having had in your hands a carbon copy, and I am merely asking you to compare the two to make sure that the copy I have had the Reporter mark is the original, and is a correct copy of the paper you have had in your hands during this recent questioning.

A. These two are identical, yes.

Mr. Murphy: The government offers in evidence, as part of the cross-examination of this witness, Government's Exhibit No. 1, being the statement just referred to.

Mr. Hotz: Kimball Laundry Company objects to the offer, except for the first three lines, which shows a sum-[fol. 238] mary of the specific damage to machinery and building, $220,799.09; then comes a depreciation of two per cent, which these men have figured out themselves, on building, and a depreciation on $280,000.00 worth of machinery.

The Court: Confine your objection to the instrument. I will hear you if you want an argument on it.

Mr. Hotz: And they arrived at a depreciation here on their own calculations—

The Court: Are you saying it is incompetent and improper cross-examination, or it is immaterial, or what is the matter with it?

Mr. Hotz: It is improper cross-examination. It is not the proper method they have used in attempting to arrive at the question we understand is to be submitted, and that was the fair value of the leasehold right during that period of time, and if we are going into this, then we should go into the proposition of valuation, of cost, of expenses of operation and things of that sort.

The Court: Objection overruled. The instrument will be received as part of the cross-examination, figures concerning which the witness on the stand has been interrogated.

[fol. 239] Government's Exhibit No. 1, appearing in Volume IV, at Page 1098.

[fol. 1098] GOVT. EX. 1 (Received)

Difference in value of Machinery	$153,131.54		
Difference in value of Boilers	32,667.55		
Difference in value of Building	35,000.00		
		$220,799.09	
Taxes and Insurance $7,000.00 per year		25,200.00	
Depreciation 2% on $280,000.00 Building	$ 20,160.00		
Depreciation 10% on $55,000 Machinery	19,800.00		
Depreciation 5¾% on $218,831.00 Machinery	45,298.00		
Depreciation 5% on $62,928.00 Boilers	11,327.00		
Total Depreciation	96,585.00		
Miscellaneous Expense—			
Storage—Customers laundry	$ 5,400.00		
Litigation Expense	8,000.00		
Truck Reconditioning	3,000.00		
		16,400.00	
Business Loss—4 Months		75,000.00	
		$433,984.00	
Return on Investment		136,016.00	
TOTAL CLAIM		$570,000.00	
			$570,000.00

Yearly Expenses	
Taxes and Insurance	$ 25,200.00
Depreciation	96,585.00
Return on Investment	136,016.00
3.6 years	$257,801.00
Per Year	$ 71,611.39

Redirect Examination of A. L. Jacobberger by Mr. Hotz:

Q. What is the total annual depreciation that was taken by the Kimball Laundry Company per year on your building, machinery and equipment, in 1942, and right on up? A. Prior to the taking?

Q. Yes. A. For income tax purposes?

Q. Yes, for income tax purposes.

A. Total ran about $26,000.00 a year.

Q. The total ran around $26,000.00 a year, and that is what you were allowed by the government to deduct?

A. From our operating expenses for computing income taxes.

Q. On this Government's Exhibit 1, they have depreciation off here on the right-hand side of $96,585.00, and we assume—I don't know—but for the three and one-half year period.

Mr. Hotz: Is that what your idea was, Mr. Murphy?

Mr. Murphy: My questions to the witness clearly disclosed that is what it was.

[fol. 240] Mr. Hotz: For the three years?

Mr. Murphy: Three years, seven months and eight days.

Q. You heard Mr. Murphy's statement, did you not?

A. Yes.

Q. He says that the $96,585.00 that is on the statement you have in your hand, was the total depreciation taken on the property, subject to depreciation, which would mean everything but land, over three and one-half years?

Mr. Murphy: I object to that question as irrelevant and immaterial and entirely argumentative and indefinite. I really don't know what it is about.

The Court: It is argumentative. This is the depreciation in the statement that he took for income tax purposes?

Mr. Murphy: No, that is the depreciation testified to by him yesterday, and I have a transcript of his testimony in which he arrived at the $570,000.00 item. That is merely a compilation.

The Court: Of the testimony now in the record?

Mr. Murphy: Yes.

Q. Is the figure $96,585.00 correct for the depreciation [fol. 241] for the three and one-half year period?

Mr. Murphy: Objected to as an attempt to impeach his own witness.

The Court: Put it the other way. Does he wish to change the statement he made yesterday?

Q. Do you wish to change it?

The Court: Call his attention to the statement and likewise be fair to the witness. Let him read his testimony.

Mr. Hotz: These men figured it out themselves. He figured a certain percentage. They take their own items.

The Court: All right, you are trying the case. I can't do any more for you.

The Witness: May I explain this? I want to be sure we understand one another. When I gave Mr. Murphy the items yesterday of two per cent and ten per cent and five and three-quarters per cent, I believed at that time he was asking me how I figured we were entitled to $350,000.00 for the use of that property, and he said then, how do you break that down, how do you figure $350,000.00, and of course, the depreciation that we had previously been allowed for income taxes is a part of that $350,000.00.

[fol. 242] Q. Is that item $96,585.00 correct for the three and one-half years? A. I can't say it is correct.

Mr. Murphy: Objected to for the same reason stated before, and it is the same question exactly.

The Court: Sustained. If you wish to make any change or any explanation of the testimony which you gave yesterday or this morning, you will be at liberty to do so.

A. That figure is correct, if we figure it on the basis of what we had taken for depreciation. It is correct if we are going to figure it on the basis of depreciation during the three years and six months the army had it.

The Court: That makes it clear. Let us go on to something else.

Mr. Hotz: Your Honor, please, just a moment.

Q. It is correct, you say, if you take what, now?

A. The depreciation on that figure is near correct.

Q. For what period of time?

A. Based on what we took as the Kimball Laundry Company in the depreciation for income tax purposes. It is not a correct depreciation with the actual reference to what depreciation or wear and tear was on the equipment during the past three and one-half years.

[fol. 243] Q. I am calling your attention to the items of two per cent on $28,000.00, depreciation on the building; two per cent on $28,000.00?

A. No, that is incorrect.

Q. That is what I am trying to bring out. That is $280,000.00?

Mr. Murphy: May I ask leave of Court to make that correction? I said if there were arithmetical errors, we would be able to correct them. That figure should be $280,000.00. It is $28,000.00 as written here. May I have authority to correct it on the original?

The Court: Yes.

Q. On the next item, after the building, is depreciation, ten per cent on $55,000.00 worth of machinery, and five and three-quarters per cent on $218,000.00 worth of machinery. Have you any correction to make in connection with that? In other words, were those accurate figures from the actual statement of the specific items?

Mr. Murphy: Object to that question as incompetent and immaterial, and being a double question in one. The first half of the question, I think, was all right, if he wishes to make any correction.

[fol. 244] Question read.

The Court: Objection overruled.

A. Those figures are based—what was done yesterday, they took $273,000.00 of laundry equipment and in breaking it down, that is just a rough figure, so the $55,000.00 couldn't be accurate so far as our records are concerned, nor can the $280,000.00. The split on the ten per cent and five and three-quarters, was purely a matter of

guessing here. It wasn't accurate, but I explained to Mr. Murphy and to the Court here, that some of our equipment was depreciated at ten per cent for income tax purposes, and others depreciated at five and three-quarters per cent, and he said, how much was the per cent of it, and I think I said twenty per cent; approximately that figure. That is how he made that break-up there.

Q. Is not the depreciation figured on cost?

Mr. Murphy: Object to that as incompetent and immaterial and too indefinite. I don't know what depreciation he is speaking of, the income tax, or this depreciation.

Mr. Hotz: The income tax is the only purpose we have.

[fol. 245] The Court: You had better reframe your question.

Q. In taking percentages of deductions, these deductions, such as you have given, is percentage based upon cost, or based on present-day valuation. A. This—

Q. Not that. I am asking you the question on depreciation, when you take depreciation?

The Court: For income tax purposes?

Q. Yes, for income tax purposes, you take it on cost, do you not? A. Yes.

Q. Are the figures given in this exhibit based on cost or are they on the valuations you gave here in the court?

A. On the valuations I gave in court and not on the cost of equipment.

Q. So that on the cost you stated the depreciation taken on your income tax return, would bring it up to $26,000.00 per year? A. Yes.

Q. It is the depreciation allowed by the government, is it not, so that over a certain period of time you may depreciate the full cost of the item, is that right?

A. Yes, sir.

[fol. 246] Mr. Murphy: Just a minute. Objected to as leading and suggestive.

The Court: Very leading, indeed, and somewhat argumentative.

Mr. Hotz: I beg your pardon.

Q. Will you please explain the difference between this item $96,585.00 for depreciation, and the $26,000.00, per annum, which you stated that your company had been allowed each year on depreciation for the government? You have both figures now before you.

Mr. Murphy: Objected to, first, for the reason it is incompetent and not reflecting the testimony of the witness. His figure was $28,000.00, and for the further reason, it calls for a mere conclusion and computation of $28,000.00 multiplied by 3.6.

The Court: And I think it is a jury question, too. It is a question for the jury, after all, when it comes to all the evidence in the case. If the witness desires to make any further explanation of the matter, he may do so. Here are the figures. Here is the statement made that Mr. Murphy says reflects his testimony, and then, if the witness has explained that it does not reflect part of his testimony, or does not clearly reflect the meaning of his testimony, if there is anything else, let us have it.

[fol. 247] A. Well, I can explain this item we are discussing.

Q. When you say, "this item"—

A. This item on this report, the amount of $96,585.00.

Q. For depreciation?

A. For depreciation purposes, on this exhibit, were computed from the questions that Mr. Murphy asked me yesterday and having nothing to do actually with what they actually are in the records and books of the Kimball Laundry Company. In other words, this is not the accurate figures by any means.

Q. Is it true that the tabulation they have made from your testimony, the percentages were figured upon the valuations of those items at this time, or in November, 1942, and not on actual cost to the company?

Mr. Murphy: Objected to as leading and suggestive and has already been asked and answered.

The Court: Repetitious, yes. Sustained.

Q. They have litigation expense, $8,000.00, down next

in the miscellaneous expense. Is that the term you used yesterday in your testimony?

Mr. Murphy: Objected to as invading the province of [fol. 248] the jury. It is for the jury to recall.

Mr. Hotz: He is offering an exhibit now.

The Court: Sustained.

Q. Was there $8,000.00 of litigation expense?

A. Yes, $8,000.00 of litigation expense, yes. There had been expenses in connection, since 1942, of November, in the appraisal matter, and expense incurred on previous matters that have come up due to the taking, in the neighborhood of $8,000.00.

Q. Was that audits and bookkeeping expense and things of that sort?

A. Bookkeeping audits and exhibits and things of that kind, expense we have been put to in that regard because of the taking. Those items, as I have explained before when Mr. Murphy asked for them, yesterday, were merely explaining, as I thought he wanted to know what we were going to do with the money we were asking for.

Mr. Murphy: I move to strike that last answer as not responsive and as a voluntary statement and conclusion of the witness.

The Court: Sustained.

Q. They have in here a business loss, four months, $75,000.00. They have that on there, Government's Exhibit 1. Is that a correct statement?

[fol. 249] Mr. Murphy: Object to that.

Mr. Hotz: Let me at least get my question in.

The Court: You have such privileges as you are entitled to and as the court affords you. You have not been denied any privilege and you will not be.

Mr. Hotz: I am talking about—

The Court: You talk to the court.

Mr. Hotz: Mr. Murphy interrupts me before I get through.

The Court: You interrupt the court. Go ahead with your question and conclude it. Are you finished?

Mr. Hotz: Yes.

Mr. Murphy: Objected to as incompetent and immaterial and indefinite, an attempt to impeach their own witness. It is indefinite, so we can't tell.

The Court: No, it isn't at all. Business loss he testified to doesn't use his language, but he testified it would take four months to get the business going after he got his building back and he estimated that loss at $75,000.00. That is clear to everybody. Why spend any time fussing about it?

[fol. 250] The Witness: Do I have a question to answer?

Mr. Murphy: No.

The Court: Ask another question.

Q. Were there other items Mr. Murphy did not ask you about in connection with the $350,000.00?

A. There are naturally going to be other items. If you want me to break down the $350,000.00—that is what we were talking about—that is the amount over the cost of putting this plant back in shape so far as the physical condition is concerned. We have an amount of $350,000.00 we have asked for the use of that building during these three and one-half years, and as to the expenditures of all that money—in other words, the item of return on investment of $136,000.00, as it would appear on this report, would show that that is money we will have in our pocket. That is not a fact. That money will all have to be spent to put back the Kimball Laundry Company in the shape it was in when it was taken over in 1942, and more than that.

Mr. Murphy: I move to strike the last part of the answer of the witness as to what he proposed to do with the money, as not responsive, and self-serving declaration; incompetent and immaterial.

[fol. 251] The Court: It does not pertain in any way to the measure of recovery. What the damage is is what he is entitled to. It does not matter if he gives the money to charity, if he wishes, or he can double it, or do anything he wants with it. That is not our consideration. The question here is what was the damage to the Kimball Laundry Company on the 22nd day of November,

1942, when they took this property away from them for three years and one-half, or more. Anything in there pertaining to the property is competent, and anything which pertains personally to the owner is not. Consequently, damages can not be recovered. I have announced that rule and I am trying to adhere to it. That is the rule as pronounced here and later on by the Supreme Court, and I hope we will keep within the rule. I suppose you are both trying to do so. Objection sustained.

Q. To summarize and finally give us the statement that you have, the figure you have, and have heretofore given in regard to the fair value of the temporary use of this property for a period of three and one-half years—

The Court: A little more than that, three years, seven months and eight days.

[fol. 252] —and exclusive now of the actual damage, as you view it? A. The damages—

Mr. Murphy: Wait just a moment. Object to that question as entirely incompetent and indefinite.

The Court: May I help you with the question?

Mr. Hotz: Yes, indeed.

The Court: And clear up what we have in our minds.

Q. By the Court: Mr. Jacobberger, the jury and the Court are concerned with the elements and the amount that you attribute thereto which go to make up what you say your company is entitled now to recover as damages, or as just compensation, or as rental money, whichever you wish to put it, for the taking of this property, the land, the building, the machinery, and the use thereof for three years, seven months and eight days. The elements that are allowed are elements which pertain to the building and its use, its construction, whether it is over-crowding in its operation, or anything like that. That is allowable under the law. It is our duty and we are trying to do, everybody here, both sides of the case, to arrive at the just figure, the just compensation, what is [fol. 253] right and what is wrong. If there is any other item you have not enumerated that comes within that, we

want you to tell us what you value it at and we will consider your testimony, with all the other testimony and all the other facts in the case. Have I made myself clear?

A. Yes.

The Court: Now, will you ask your question with that in view? Bring that out.

Q. All right, Mr. Jacobberger, give us your conclusion, your opinion, as an officer of this company, just as a summary statement, of the fair value for the temporary use of that property and all its component parts, as it stood in November, 1942, and which was taken over by the government?

Mr. Murphy: Objected to as having been already asked and answered.

The Court: Yes, that is repetition. We are trying to get at the elements. Mr. Jacobberger has enumerated different considerations, that he has had in mind, elements that go into this verdict that will be rendered in this case; he has evaluated the damage to the building, damage to the machinery; he has referred to the [fol. 254] use the property that has been taken away from him has been put to; he has been deprived of the use of his property. As one of the elements, he asked for and tells us about, $75,000.00, he thinks they should have for the time it will take them to repair and put the building back in operation, the use of it. It will take them four months, he says, before they can get the use of the property after it is surrendered, and for that he asks $75,000.00. He speaks of the storage, to store the trucks that they have not used, and there are possibly some other items, but whatever they are, if there are any other items that I don't have clear in my mind, tell us about them, what you think they are. Among the items, you say you have an expense, after the property was taken, preparing yourself for this trial, or for negotiations. Well, that does not necessarily pertain to the building, but we will consider it anyway for a while, $8,000.00 or $9,000.00 for that. What are the other items? You lost the use of the property. It has been taken away

from you. If you are remunerated you get just remuneration for the use of the property for three years, seven months and eight days. If your building is repaired [fol. 255] and put back in the same condition it was in when it was taken from you—as to any depreciation or damage to the machinery, if that is all repaired or paid for, or money is given to you and put your property back as it was before—what are the other items? That is what counsel is inquiring about. If you have named all of the items, then we will pass on and see what your brother, Mr. Harry, the president, has to say. He may have something to say.

Q. The Government's Exhibit 1, uses the term "Business Loss—4 months $75,000.00." That came at the close of your testimony yesterday and I assume you didn't see this typewritten exhibit until it was handed to you this morning? A. No, I didn't.

Q. If you have any further explanation to make in connection with that $75,000.00, that would make it more clear, after hearing the court's remarks, please do so. Now is the time to do so.

A. The total amount $220,000.00, I said yesterday we were entitled to, which included the damages to the building and the boilers and the machinery, plus the $350,000.00, to go to make up the $570,000.00, is what the [fol. 256] final total figure is that we feel we are entitled to for the use of that property and the destruction that has been caused thereon up to the time specified, three years, seven months and some days, and of course, those are purely based on what we are allowed in this case to talk about, and that is building, machinery and land, and has nothing to do whatsoever with trade routes.

Q. On this item, business loss, four months, $75,000.00, what is your explanation, if you have any to make, on that item, under the heading as put by the government in their Exhibit 1, business loss, four months?

Mr. Murphy: That is objected to as, incompetent, immaterial and repetitious, having been asked and answered

half a dozen times, and the witness given ample opportunity to explain everything.

Mr. Hotz: I don't think so.

The Court: That is the item you referred to as the time it will be necessary to put the plant back in operation?

The Witness: That is the expense we would be incurring during that time.

The Court: Is it expense or time?

The Witness: It is the expense that would be incurred [fol. 257] to the Kimball Laundry Company for that four months time.

The Court: I am not clear in my mind. You are entitled to whatever expense in the way of damages; that is, to repair the damages and to put the building in shape. Is that what you mean?

The Witness: No, this item he has listed here, business loss, that is not correct.

The Court: Suppose you tell us again the elements that go to make up that $75,000.00 item. I take it now, you say this is in addition to the items for the repairing of the damage to the building and the damage to the machinery. After that is done, after you are paid for it, what are the elements that go to make up the $75,000.00 if you say it isn't loss of time, while the building is being repaired, after it is abandoned?

The Witness: That $75,000.00 item, when the government gives the building back, we will have a payroll going on; we will have to start building up our organization to get ready to offer our services to the public; we will have the expense of taxes and insurance and all the items to go to make up getting the thing ready to go prior to the day we can open up for the public so that [fol. 258] we can start taking in revenue to offset those expenses. That is what I had reference to.

The Court: This is an estimated item, not only covering the item of this business matter, or consequential matter of getting your business back, but what does it include? What does that include as pertaining to the

property itself, not getting your business back, not building up your trade, not reestablishing or improving your good-will, but the building and property itself?

The Witness: It again includes taxes and insurance and depreciation that will go on what is there.

The Court: Will that be time? How long will it take you? Suppose on the 15th of this month, or maybe tomorrow, the government sees fit to abandon the building to you. The jury here does not have any advice on that, and so, consequently, we are trying the case on the theory that they will retain the property through the 30th of June, 1946, and I shall instruct the jury here to make allowance for the use of the building and property up to that time, but suppose they turn the property loose tomorrow. Will the allowance we might make you now [fol. 259] to the 30th of June enable you to make these repairs and get all ready to move in on the first day of July?

The Witness: I doubt that very much, because of the inability today to get materials and get labor and get the work done. I figure it is going to take us from four to six months in renovating and getting going. We have to build an organization of employees back.

The Court: That does not pertain to the building.

The Witness: No, I know that.

The Court: Let us go on, anyway.

Q. The question I neglected to ask on direct examination, I believe, and one which I would like the privilege of asking now—

The Court: Very well.

Q. Is there any machinery and equipment, laundry machinery and equipment in that building now that belongs to the United States Government used in the operation of the laundry? A. Yes, there is.

Q. Do you know what items they are and could you tell us? A. Yes.

Q. What are they?

Mr. Murphy: Objected to as irrelevant and immate-

[fol. 260] rial; not within the issues of this case; not a part of the property taken.

The Court: I take it what he is leading up to now is this property will have to be removed after it is surrendered and will have to be replaced and going to this question of time. Is that what you are seeking?

Mr. Hotz: That is part of it.

The Court: What is the other part?

Mr. Hotz: The other part of it is, I want to ask a question in connection with Exhibit 21, to show it is not included in there, and there is talk about the government, no doubt, having put improvements and things in there, but the government makes claim to that. They own that. It belongs to the quartermaster corps, and it has to be bought and paid for, the same as new machinery.

The Court: There has been nothing in the record in reference to this property until now. The property listed on Exhibit 21 is property of the Kimball Laundry Company. If that is the only purpose—

Mr. Hotz: That is one of the purposes. Another one is, for instance, here will be a piece of machinery that is gone. It shows on Exhibit 21 as gone, and yet they [fol. 261] are operating just the same without that piece of machinery. I want to show from the witness here—it isn't a great long list of things, but it is a number of things that aren't there and how they are able to operate that laundry. It is necessary, it seems to me, in connection with the question of value of the mechinery, that goes to the value of the machinery and the condition that it was in in 1942 and at the present time when it is taken back, to show whose machinery is down there.

The Court: All right, I will permit it. What is the machinery down there that belongs to the United States, or parts, or whatever they are, that they will remove or sell to someone else, if not to you?

The witness: There are any number of items. One particularly, there is an air compressor; for instance, the one we had in there was destroyed and they put in an air

compressor suitable for what they felt their needs were, electrically driven, so that is the only one there. However, it does not and would not serve the purpose for which the Kimball Laundry would use it for, and therefore it will have to remain there.

[fol. 262] Mr. Murphy: I object to the witness testifying further along that line and move to strike his testimony about it. The question as I understand it, was what property was there of the Government.

The Court: Sustained.

Q. What is an air compressor? Tell us what an air compressor is in the operation of the laundry, whether it is necessary in its operation.

A. It is either a motor-driven or steam-driven compressor to compress air and allow—

The Court: Let us proceed and get the list before we divert. Let us have him answer the question.

A. The list of government items that are there at the present time, about twenty-two drying tumblers, drying machines. They have five extractors. Those are machines to extract the moisture out of the clothes after they are washed. They have two hosiery forms for drying hose. They have a four-girl-operated unit, shirt unit for finishing shirts. They have two button sewing on machines for sewing on buttons. They have twenty-three marking machines and fourteen marking tables; four presses, model 51, and four presses, model 107; they have extractor con-

[fol. 263] tainers, three sets; those are just some of the items. There are others that are not on this list.

The Court: Are any of these items referred to in Exhibit 21? A. No.

The Court: They have nothing to do with that exhibit?

A. No, sir.

The Court: I take it this replaced other property?

A. In some instances, and in some instances added to the volume.

A. But the government claims ownership in that property?

A. In these items, yes, they belong to the government.

Q. Will they have to be replaced by the Kimball Laundry Company? A. Quite a number of them.

Q. And especially I want to know in connection with the condenser? A. Air compressor?

Q. Yes. A. That will have to be replaced.

Q. Can the laundry operate without a compressor?

[fol. 264] A. No.

Q. And that is owned by the government? A. Yes.

Q. Do you know anything about the valuation of that government property?

A. No, I don't. I could estimate it, but I don't know what they value it at.

Q. Are you in the market to purchase it?

The Court: That is immaterial. Let us go on with the lawsuit. That has nothing to do with this case.

Recross-Examination of A. L. Jacobberger by Mr. Murphy:

Q. This government laundry machinery that you have described is there in your plant being used and operated as part of the laundry operations, is it not?

A. Some of it has been disconnected and set to one side.

Q. If and when the army goes out and you go back in you will have the option of buying any of it, as it sits there, if you agree on a price, and if you don't the army will move it out? That is your understanding of the facts. A. That is what they have told me, yes.

Witness excused.

[fol. 265] Mr. Murphy: Petitioner now moves the Court to strike from the record the testimony of the witness A. L. Jacobberger to the effect that in his opinion the value of the use of the premises here involved for the period from November 22, 1942, to June 30, 1946, is the sum of $570,000.00, for the reason that said figure under the testimony of said witness constitutes and comprises and is made up of certain figures and factors not recoverable herein and not constituting items of just compensation, nor evidence of just compensation, and which said

figures and factors are incompetent and immaterial and constitute in some instances purely business items and in other instances constitute duplication of other figures and factors likewise included in said total figure.

Petitioner moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value of $570,000.00 in the testimony of this witness, A. L. Jacobberger the sum of $16,400.00 identified by said witness as covering costs of storage of trucks and other items not involved in this action, and also including business expenses of audits and appraisals in [fol. 266] connection with this action and not constituting compensable items in this action.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger and to entirely disregard the item of $50,000.00 to $75,000.00 constituting a part thereof as testified by said witness, and which said sum comprises speculative business expense items anticipated as possibly arising at some future date and entirely after the period of possession of these premises by petitioner.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger, and to further disregard the item and sum of $11,327.00, constituting depreciation on the power plant, for the reason that said item and figure constitutes a duplication of and is also included in the claim of damage to said power plant in the sum of $32,667.55, as shown by Exhibit No. 23, and constituting the full difference in value of said [fol. 267] power plant as of the time of taking and as of the present date, and which last mentioned figure includes all depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 from the testimony of this witness, A. L. Jacobberger, and to entirely disregard the further sum of $65,098.00, constituting claim of depreciation to that extent on the laundry machinery here involved, for the reason that said last mentioned sum constitutes a duplication and is included and covered by the figure and claim of $153,131.54, constituting the difference in value according to respondent's own witnesses of the said laundry machinery between the date of taking and the present time, and which last mentioned figure includes all items of depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

The Court: I will instruct the jury with reference to these items when the proper time comes. The record will show the same ruling.

Mr. Harry E. Judd, produced as a witness on behalf of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name, please. A. Harry E. Judd.

Q. What is your business?

A. Certified public accountant.

Q. How long have you been in business in the City of Omaha?

A. Just about twenty-two to twenty-three years.

Q. What is the name of the organization with which you are identified? A. Moeller, McPherren & Judd.

Q. Where do you office?

A. Omaha National Bank Building.

Q. What has been your training and experience as a C. P. A.?

Mr. Murphy: May I interrupt? Unless counsel desires, we will admit the qualifications of this witness as a qualified C. P. A.

The Court: Show he is duly licensed under the Nebraska statute.

[fol. 269] Q. You are duly licensed under the Nebraska statute?

A. I have taken an examination and passed the examination, if that is what you mean.

Q. I believe you also studied law and graduated from the law school? A. Yes.

Q. From Creighton University? A. Yes.

Q. How long ago? A. 1927.

Q. Have you had any special experience in connection with evaluation of laundries? A. I had some, yes.

Q. Just generally what has that been?

A. I have had to value laundries for state purposes and for going concerns, business concerns, and things of that sort. Also in the course of my audits and examinations of the records of the laundries.

Mr. Hotz: This question, if Your Honor please, is one you have already gone into, but I must have my record.

Q. Calling your attention to Defendant's Exhibit 14, I will ask you to state if that was made up by you?

A. It was.

[fol. 270] Mr. Hotz: Without going into detail, it purports to evaluate customers of this business and customers routes.

The Court: Make your offer now and you will have your record and proof by this witness.

Mr. Hotz: We offer in evidence Exhibit 14.

Mr. Murphy: Objected to by petitioner as incompetent, irrelevant and immaterial, for the reason it is not evidence of the fair market value or fair use value of the property taken, and not relating to any issue in this case, and is evidence relating solely to the skill and management, and to matters of the business operations, profits and loss of profits.

The Court: The objection is sustained.

Mr. Hotz: We offer to prove by the witness the contents of Exhibit 14 and the conclusions therein to be in reference to the standard method used by laundries in

evaluating customers and trade routes, and the witness also will testify that the same has been used and adopted in the case of Metropolitan Laundry Company before the United States Board of Tax Appeals, Volume 2, U. S. B. T. A., Page 1062, and more particularly Page 1066; and also in the case of Pioneer Laundry Company found [fol. 271] in Volume 5, U. S. B. T. A., in the case of Pioneer Laundry Company vs. Commissioner of Internal Revenue, and especially on Page 822.

The Court: What is it you are referring to in the law book?

Mr. Hotz: It is the similar method that had been adopted in laundry evaluation cases before the United States Board of Tax Appeals.

Mr. Murphy: Petitioner objects to the offer for the same reason as to the question, and for the further reason the offer is broader than the question and calls for a legal conclusion of the witness.

The Court: Objection sustained.

Kimball Laundry Company's Exhibit No. 14, appearing in Volume III, Page 1061.

[fol. 1061] D. EX. 14 (Refused)

MOELLER, MCPHERREN & JUDD
Certified Public Accountants
Omaha National Bank Building
Telephone JAckson 2119
Omaha, Nebraska

Wayne McPherren, C.P.A.
Harry E. Judd, C.P.A.
Member American Institute of Accountants
Henry C. Moeller, C.P.A.

VALUE OF CUSTOMERS SERVICED BY KIMBALL LAUNDRY DURING 1942

15,093 General Customers valued at $20.00 ea.	$301,860.00
4,648 Pillow Customers valued at .50 ea.	2,324.00
6,810 Table Linen-Spread Customers valued at .50 ea.	3,405.00
5,814 Rug, Comfort & Blanket Customers valued at .50 ea.	2,907.00
8,178 Lace Curtain Customers valued at .50 ea.	4,089.00
1,500 Call Customers valued at 10.00 ea.	15,000.00
44 Commercial Customers producing $34,253.13 revenue for 47 weeks during 1942 equals $728.79 per week at 15 times	10,931.85
Total value of Customers Served	$340,516.85

Above data prepared from number of customers supplied to the undersigned from the records of the Kimball Laundry Company, Omaha, Nebraska.

Respectfully submitted,
MOELLER, MCPHERREN & JUDD
By Harry E. Judd,
Certified Public Accountant

Mr. Hotz: I have three more exhibits.

Q. Exhibit No. 15, I will ask you to state what that is, without giving any of the contents of it, but if it was prepared by you and when and under what circumstances?

A. It was prepared by me. I think it was sometime in 1943, and I prepared it in conjunction with examination I made of the Kimball Laundry records and con- [fol. 272] ference with Mr. A. L. Jacobberger and Mr. H. A. Jacobberger.

Q. And was the document prepared by you, however?

A. It was.

Q. You were just giving us the source of your information in preparation of the document?

A. That is right.

Q. And the document appertains generally to the

building up of trade routes and customers, and so forth, is that right?

A. This pertains possibly to the expense incurred in starting up and continuation of the business.

Mr. Hotz: We offer in evidence Exhibit 15.

Mr. Murphy: Petitioner objects to the offer for the same reason as to Exhibit 14, and asks that the reporter be permitted to repeat the objection in detail.

The Court: Objection sustained.

Q. I will hand you Exhibit 16 and Exhibit No. 17. To save time, Exhibit 15 was the first year's operation and Exhibit 16, the second, and Exhibit 17, the third year's operation, so that it will save time, and I will ask you if Exhibits 16 and 17 were also prepared by you and from the records and files of the Kimball Laundry Company, and in collaboration with the officers and accountants of [fol. 273] that concern? A. They were.

Q. And Exhibits 16 and 17 are the same as Exhibit 15, in effect, showing the expense incidental to building up the trade and routes? A. That is right.

Mr. Hotz: We offer in evidence Defendant's Exhibits 16 and 17.

Mr. Murphy: Petitioner objects to the offer of the exhibits and to each of them separately, for the same reasons as the objections to Exhibit 14, and ask that the Reporter extend the objection in detail in the record.

The Court: Objection sustained.

Mr. Hotz: We offer to prove by this witness the contents of Exhibits 15, 16 and 17, and to prove through the witness the facts set forth in the exhibits.

Mr. Murphy: Same objection to the offer as to the exhibits and for the further reason that the exhibits themselves are the best evidence of what they would prove.

The Court: Sustained and offer denied.

Kimball Laundry Company Exhibits Nos. 15, 16 and 17 appearing in Original Volume III, at Pages 1062, 1063, 1064, respectively.

D. EX. 15, pp. 1 to 3 (Refused)

[fol. 1062-1] KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Estimated Gross Income & Operating Expenses First Year

		Per Month		*Twelve Months*
Gross Income		$ 8,333.33		$100,000.00
Operating Expenses:				
Productive Labor—				
Commercial Dept.—				
2nd Floor	$ 901.35		$10,816.00	
Family Service	1,022.66		12,272,00	
Finish Department	2,517.66		30,212.00	
Specialties	433.35		5,200.00	
Dry Cleaning	1,295.66		15,548.00	
Miscellaneous Payroll	3,167.66	$ 9,338.34	38,012.00	$112,060.00
Soap		85.00		1,020.00
Salt		25.00		300.00
Soda Sauer & Blue		85.00		1,020.00
Starch		20.00		240.00
Paper & Twine		40.00		480.00
Boxes, Boards, Bands, Covers		210.00		2,520.00
Padding		100.00		1,200.00
General Supplies		250.00		3,000.00
Dry Cleaning Supplies		230.00		2,760.00
Water		90.00		1,080.00
Gas		5.00		60.00
Zoric Machinery Depreciation		275.00		3,300.00
Machine Repairs		200.00		2,400.00
Laundry Machinery Depreciation		900.00		10,800.00
General Labor		.....		.....
Superintendents		.....		.....
Cold Storage Equipment Depreciation		26.00		312.00
Insurance—Fire & Liability		275.00		3,300.00
Taxes		400.00		4,800.00
Building Repairs		200.00		2,400.00
Building Depreciation		355.00		4,260.00
Pillow Equipment Depreciation		16.00		192.00

Power Overhead—		
Labor	.....	.....
Fuel—100 Tons per month	700.00	8,400.00
Repairs	275.00	3,300.00
Machinery Depreciation	60.00	720.00
Supplies—Oil Waste	50.00	600.00
Power Purchased—60%	252.00	3,024.00
General Expense—		
Executive Salaries	2,000.00	24,000.00
S. S. Tax, Etc.	200.00	2,400.00
Payroll Tax	50.00	600.00
Office Equipment Depreciation	40.00	480.00
Office Clerk	.....	.....
Bad Debt Allowance	40.00	480.00
Office Supplies, Printing & Stationery	350.00	4,200.00
Advertising	1,000.00	12,000.00
Loss & Damage	40.00	480.00
Refunds	25.00	300.00
Free Work	100.00	1,200.00
Miscellaneous	80.00	960.00
Collection & Delivery—		
Wages & Commissions	1,666.00	19,992.00
Agency Commissions	200.00	2,400.00
Council Bluffs	.....	.....
Route Mechanic	.....	.....
Delivery Equipment Depreciation	170.00	2,040.00
Auto Tires	40.00	480.00
Gas & Oil	400.00	4,800.00
Auto Truck Repairs	100.00	1,200.00
Miscellaneous	10.00	120.00
Total Operating Expenses	$20,973.34	$251,680.00
Operating Loss for first year of Operation commencing from date plant was taken to re-establish condition existing 11-21-42	$12,640.01	$151,680.00

[fol. 1062-2] KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Minimum Number of Employees Required to Begin Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	2ND FLOOR			
2	Washing	1 Man	$28.00	$ 28.00
8	Flat Ironing Machine	9 Girls	20.00	180.00
				$208.00
	FAMILY SERVICE			
9	Marking	5 Girls	20.00	$100.00
4	Washing	2 Men	28.00	56.00
1	Tumbling	1 Woman	20.00	20.00
14	Flat Ironing	See above		
2	Napkins	1 Girl	20.00	20.00
5	Checking	2 Girls	20.00	40.00
				$236.00
	FINISH DEPARTMENT—3RD FLOOR			
14	(Marking & Sorting	5 Girls	20.00	$100.00
	(Checking	2 Girls	20.00	40.00
3	Washing	2 Men	28.00	56.00
19	Shirt Machine Operators	10 Girls	20.00	200.00
2	Seamstress & Inspector	1 Girl	25.00	25.00
1	Shirts—Hand Iron	1 Girl	20.00	20.00
2	Collars & Handkerchiefs	1 Girl	20.00	20.00
1	Hand Iron	1 Girl	20.00	20.00
10 to 15	Pressing	4 Girls	20.00	80.00
4	Tumbling Operator	1 Girl	20.00	20.00
				$581.00
	SPECIALTIES			
2	(Marking	1 Girl	20.00	$ 20.00
	(Checking	1 Girl	20.00	20.00
7	Curtains	2 Girls	20.00	40.00
7	Blankets, Pillows & Linen	1 Girl	20.00	20.00
				$100.00

DRY CLEANING

3	Marking	1 Girl	20.00	$ 20.00
2	Machine Operators	2 Men	28.00	56.00
2	Wool & Silk Spotting	1 Man	32.00	32.00
4	Press Operators—Wool	2 Men	28.00	56.00
7	Silk Finishers	2 Girls	20.00	40.00
3	Tailor	1 Man	40.00	40.00
1	Hat Operator	1 Man	35.00	35.00
3	Checker & Inspector	1 Girl	20.00	20.00
				$299.00

[fol. 1062-3] KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Minimum Number of Employees Required to Begin Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	MISCELLANEOUS PAYROLL			
5	Porters	4 Men	$24.00	$ 96.00
4	Superintendents	2 Men	60.00	120.00
2	Power	2 Men	70.00	140.00
1	Telephone Operator	1 Girl	25.00	25.00
1	Bookkeeper	1 Girl	35.00	35.00
1	Billing Clerk	1 Girl	25.00	25.00
2	Stenographer	1 Girl	25.00	25.00
2	Price Clerk	1 Girl	25.00	25.00
2	Counter Girl	1 Girl	25.00	25.00
3 Jobs	Office Manager	1 Man	60.00	60.00
1	Stock Clerk	1 Girl	25.00	25.00
1	Doorman	1 Man	25.00	25.00
1	Chute Man	1 Girl	20.00	20.00
1	Elevator Operator	1 Man	25.00	25.00
1	Garage Mechanic	1 Man	60.00	60.00
				$731.00
22	Route Men	10 Men		
	Total	95		$2,155.00

[fol. 1063] D. EX. 16, pp. 1 to 3 (Refused)

[fol. 1063] D. EX. 16, p. 1

KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Estimated Gross Income & Operating Expenses

Second Year of Operation

	Per Month		*Twelve Months*	
Gross Income		$12,500.00		$150,000.00
Operating Expenses:				
Productive Labor—				
Commercial Dept.—				
2nd Floor	$ 849.33		$10,192.00	
Family Service	1,369.33		16,432.00	
Finish Department	2,777.67		33,332.00	
Specialties	693.33		8,320.00	
Dry Cleaning	1,295.67		15,548.00	
Miscellaneous Payroll	3,271.67	$10,257.00	39,260.00	$123,084.00
Soap		127.50		1,530.00
Salt		37.50		450.00
Soda & Blue		127.50		1,530.00
Starch		30.00		360.00
Paper & Twine		60.00		720.00
Boxes, Boards, Bands, Covers		300.00		3,600.00
Padding		150.00		1,800.00
General Supplies		350.00		4,200.00
Dry Cleaning Supplies		300.00		3,600.00
Water		120.00		1,440.00
Gas		5.00		60.00
Zoric Machinery Depreciation		275.00		3,300.00
Machine Repairs		200.00		2,400.00
Laundry Machinery Depreciation		900.00		10,800.00
General Labor		.....		.....
Superintendent		.....		.....
Cold Storage Equipment Depreciation		26.00		312.00
Insurance—Fire & Liability		275.00		3,300.00
Taxes		400.00		4,800.00

Building Repairs	200.00	2,400.00
Building Depreciation	355.00	4,260.00
Pillow Equipment Depreciation	16.00	192.00
Power Overhead—		
Labor	.....	.....
Fuel	700.00	8,400.00
Repairs	275.00	3,300.00
Machinery Depreciation	60.00	720.00
Supplies—Oil Waste	50.00	600.00
Power Purchased—Net	325.00	3,900.00
General Expense—		
Executive Salaries	2,000.00	24,000.00
S. S. Tax, Etc.	225.00	2,700.00
Payroll Tax	100.00	1,200.00
Office Equipment Depreciation	40.00	480.00
Office Clerk	.....	.....
Bad Debt Allowance	40.00	480.00
Office Supplies, Printing & Stationery	350.00	4,200.00
Advertising	1,000.00	12,000.00
Loss & Damage	40.00	480.00
Refunds	25.00	300.00
Free Work	100.00	1,200.00
Miscellaneous	100.00	1,200.00
Collection & Delivery—		
Wages & Commissions—14 Men	2,332.40	27,988.80
Agency Commissions	200.00	2,400.00
Council Bluffs	.....	.....
Route Mechanic	.....	.....
Delivery Equipment Depreciation	170.00	2,040.00
Auto Tires	60.00	720.00
Gas & Oil	500.00	6,000.00
Auto Truck Repairs	150.00	1,800.00
Miscellaneous	10.00	120.00
	$23,363.90	$280,366.80
Operating Loss for Second Year of Operation commencing from date plant was taken to re-establish condition existing 11-21-42	$10,863.90	$130,366.80

[fol. 1063-2] D, EX. 16, p. 2

KIMBALL LAUNDRY COMPANY
Omaha, Nebraska
Minimum Number of Employees Required for
Second Year's Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	2ND FLOOR			
2	Washing	2 Men	$28.00	$ 56.00
8	Flat Ironing Machines	7 Girls	20.00	140.00
				$196.00
	FAMILY SERVICE			
9	Marking	5 Girls	20.00	$100.00
4	Washing	2 Men	28.00	56.00
1	Tumbling	1 Woman	20.00	20.00
14	Flat Ironing	4 Girls	20.00	80.00
2	Napkins	1 Girl	20.00	20.00
5	Checking	2 Girls	20.00	40.00
				$316.00
	FINISH DEPART.ENT—3RD FLOOR			
	(Marking & Sorting	5 Girls	20.00	$100.00
14	(Checking	2 Girls	20.00	40.00
3	Washing	2 Men	28.00	56.00
19	Shirt Machine Operators	10 Girls	20.00	200.00
2	Seamstress & Inspector	1 Girl	25.00	25.00
1	Shirts—Hand Iron	1 Girl	20.00	20.00
2	Collars & Handkerchiefs	1 Girl	20.00	20.00
1	Hand Iron	2 Girls	20.00	40.00
10 to 15	Pressing	6 Girls	20.00	120.00
4	Tumbling Operator	1 Girl	20.00	20.00
				$641.00
	SPECIALTIES			
2	(Marking	1 Girl	20.00	$ 20.00
	(Checking	1 Girl	20.00	20.00
7	Curtains	5 Girls	20.00	100.00
7	Blankets, Pillows & Linen	1 Girl	20.00	20.00
				$160.00

	DRY CLEANING			
3	Marking	1 Girl	20.00	$ 20.00
2	Machine Operators	2 Men	28.00	56.00
2	Wool & Silk Spotting	1 Man	32.00	32.00
4	Press Operators—Wool	2 Men	28.00	56.00
7	Silk Finishers	2 Girls	20.00	40.00
3	Tailor	1 Man	40.00	40.00
1	Hat Operator	1 Man	35.00	35.00
3	Checker & Inspector	1 Girl	20.00	20.00
				$299.00

KIMBALL LAUNDRY COMPANY
Omaha, Nebraska

[fol. 1063-3] D. EX. 16, p. 3

Minimum Number of Employees Required for Second Year's Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	MISCELLANEOUS PAYROLL			
5	Porters	5 Men	$24.00	$120.00
4	Superintendents	2 Men	60.00	120.00
2	Power	2 Men	70.00	140.00
1	Telephone Operator	1 Girl	25.00	25.00
1	Bookkeeper	1 Girl	35.00	35.00
2	Stenographer	1 Girl	25.00	25.00
1	Billing Clerk	1 Girl	25.00	25.00
2	Price Clerk	1 Girl	25.00	25.00
2	Counter Girl	1 Girl	25.00	25.00
3 Jobs	Office Manager	1 Man	60.00	60.00
1	Stock Clerk	1 Girl	25.00	25.00
1	Doorman	1 Man	25.00	25.00
1	Chute Man	1 Girl	20.00	20.00
1	Elevator Operator	1 Man	25.00	25.00
1	Garage Mechanic	1 Man	60.00	60.00
				$755.00
	Route Men	10 Men.		
	Total			$2,367.00

D. EX. 17, pp: 1 to 3 (Refused)

[fol. 1064-1]

KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Estimated Gross Income & Operating Expenses

Third Year of Operation

	Per Month		*Twelve Months*	
Gross Income		$16,666.67		$200,000.00
Operating Expenses:				
Productive Labor—				
Commercial Dept.—				
2nd Floor	$ 849.33		$10,192.00	
Family Service	1,456.00		17,472.00	
Finish Department	3,124.33		37,492.00	
Specialties	780.00		9,360.00	
Dry Cleaning	1,729.00		20,748.00	
Miscellaneous Payroll	3,380.00	$11,318.66	40,560.00	$135,824.00
Soap		170.00		2,040.00
Salt		50.00		600.00
Soda & Blue		170.00		2,040.00
Starch		40.00		480.00
Paper & Twine		80.00		960.00
Boxes, Boards, Bands, Covers		420.00		5,040.00
Padding		200.00		2,400.00
General Supplies		500.00		6,000.00
Dry Cleaning Supplies		460.00		5,250.00
Water		180.00		2,160.00
Gas		5.00		60.00
Zoric Machinery Depreciation		275.00		3,300.00
Machinery Repairs		400.00		4,800.00
Laundry Machinery Depreciation		900.00		10,800.00
General Labor		.....		.....
Superintendents		.....		.....
Cold Storage Equipment Depreciation		26.00		312.00
Insurance—Fire & Liability		275.00		3,300.00
Taxes		400.00		4,800.00
Building Repairs		400.00		4,800.00

Building Depreciation	355.00	4,260.00
Pillow Equipment Depreciation	16.00	192.00
Power Overhead—		
Labor	.....	.....
Fuel	700.00	8,400.00
Repairs	550.00	6,600.00
Machinery Depreciation	60.00	720.00
Supplies—Oil—Waste	100.00	1,200.00
Power Purchased	504.00	6,048.00
General Expense—		
Executive Salaries	2,000.00	24,000.00
S. S. Tax, Etc.	280.00	3,360.00
Payroll Tax	100.00	1,200.00
Office Equipment Depreciation	40.00	480.00
Office Clerk	.....	.....
Bad Debt Allowance	40.00	480.00
Office Supplies, Printing & Stationery	700.00	8,400.00
Advertising	1,000.00	12,000.00
Loss & Damage	80.00	960.00
Refunds	50.00	600.00
Free Work	200.00	2,400.00
Miscellaneous	160.00	1,920.00
Collection & Delivery—		
Wages & Commissions—16 Men	2,665.60	31,987.20
Agency Commissions	400.00	4,800.00
Council Bluffs	.....	.....
Route Mechanic	.....	.....
Delivery Equipment Depreciation	170.00	2,040.00
Auto Tires	80.00	960.00
Gas & Oil	800.00	9,600.00
Auto Truck Repairs	200.00	2,400.00
Miscellaneous	20.00	240.00
	$27,540.26	$330,483.20
Operating Loss for Third Year of Operation commencing from date plant was taken to re-establish condition existing 11-21-42	$10,873.59	$130,483.20

[fol. 1064-2] KIMBALL LAUNDRY COMPANY
Omaha, Nebraska
Minimum Number of Employees Required for
Third Year's Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	2ND FLOOR			
2	Washing	2 Men	$28.00	$ 56.00
8	Flat Ironing Machine	7 Girls	20.00	140.00
				$196.00
	FAMILY SERVICE			
9	Marking	5 Girls	20.00	$100.00
4	Washing	2 Men	28.00	56.00
1	Tumbling	1 Woman	20.00	20.00
14	Flat Ironing	5 Girls	20.00	100.00
2	Napkins	1 Girl	20.00	20.00
5	Checking	2 Girls	20.00	40.00
				$336.00
	FINISH DEPARTMENT—3RD FLOOR			
	(Marking & Sorting	5 Girls	20.00	$100.00
14	(Checking	2 Girls	20.00	40.00
3	Washing	2 Men	28.00	56.00
19	Shirt Machine Operators	13 Girls	20.00	260.00
2	Seamstress & Inspector	1 Girl	25.00	25.00
1	Shirts—Hand Iron	1 Girl	20.00	20.00
2	Collars & Handkerchiefs	1 Girl	20.00	20.00
1	Hand Iron	2 Girls	20.00	40.00
10 to 15	Pressing	7 Girls	20.00	140.00
4	Tumbling Operator	1 Girl	20.00	20.00
				$721.00
	SPECIALTIES			
	(Marking	1 Girl	20.00	$ 20.00
2	(Checking	1 Girl	20.00	20.00
7	Curtains.	5 Girls	20.00	100.00
7	Blankets, Pillows & Linen	2 Girls	20.00	40.00
				$180.00

	DRY CLEANING			
3	Marking	1 Girl	20.00	$ 20.00
2	Machine Operators	2 Men	28.00	56.00
2	Wool & Silk Spotting	1 Man	32.00	32.00
4	Press Operators—Wool	2 Men	28.00	56.00
7	Silk Finishers	3 Girls	20.00	60.00
3	Tailor	1 Man	40.00	40.00
	Tailor Assistant	1 Girl	20.00	20.00
1	Hat Operator	1 Man	35.00	35.00
3	Checker & Inspector	1 Girl	20.00	20.00
	Superintendent	1 Man	60.00	60.00
				$399.00

[fol. 1064-3] KIMBALL LAUNDRY COMPANY

Omaha, Nebraska

Minimum Number of Employees Required for Third Year's Operations

Number of Employees at Termination of Operations 11-21-42			Wage per Week per Employee	Total Per Week
	MISCELLANEOUS PAYROLL			
5	Porters	5 Men	$24.00	$120.00
4	Superintendents	2 Men	60.00	120.00
2	Power	2 Men	70.00	140.00
1	Telephone Operator	1 Girl	25.00	25.00
1	Bookkeeper	1 Girl	35.00	35.00
2	Stenographer	1 Girl	25.00	25.00
1	Billing Clerk	1 Girl	25.00	25.00
2	Price Clerk	1 Girl	25.00	25.00
2	Counter Girl	1 Girl	25.00	25.00
	Extra Clerk	1 Girl	25.00	25.00
3 Jobs	Office Manager	1 Man	60.00	60.00
1	Stock Clerk	1 Girl	25.00	25.00
1	Doorman	1 Man	25.00	25.00
1	Chute Man	1 Girl	20.00	20.00
1	Elevator Operator	1 Man	25.00	25.00
1	Garage Mechanic	1 Man	60.00	60.00
	Route Men	16 Men		780.00
	Total			$2,612.00

[fol. 274] MR. HARRY A. JACOBBERGER, produced as a witness on behalf of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name. A. Harry A. Jacobberger.

Q. Where do you reside? A. 90th and Farnam Streets.

Q. How long have you resided there?

A. About four or five years.

Q. How long have you resided in the City of Omaha?

A. Over fifty years.

Q. You are the president of the respondent and now plaintiff, Kimball Laundry Company, a corporation?

A. I am.

Q. And have been for how many years? A. Since 1912.

Q. How long have you been engaged in the laundry business? A. I began in 1903.

Q. Where? A. 15th and Jackson Streets.

Q. That is right near where you are now?

A. Right around the corner.

Q. And you have been continuously in the laundry [fol. 275] business at all times since?

A. I became a part owner in 1910.

Q. And sole owner in 1912? A. 1912.

Q. Who are the principal stockholders and officers of the Kimball Laundry, and who were they in 1942—let's put it that way?

A. H. F. Jacobberger, A. L. Jacobberger, Virginia M. Proctor, and myself.

Q. Your son Robert was a stockholder?

A. He was a stockholder while he was alive.

Q. Until his death in July, last year? A. 1944.

Q. How long has Fred been identified with the Kimball Laundry Company? A. Over ten years.

Q. Until when? A. Until he joined the army in 1943.

Q. In the army, what generally, was his work in the army?

A. He was in charge of the quartermaster laundry in the army.

Q. And the training he got was under you in the Kimball Laundry Company, was it? A. Yes, sir.

[fol. 276] And Al continued in the operation of the Kimball Laundry Company, giving his sole and exclusive time to it since it was taken over? A. Yes.

Q. The record shows it was so taken over by the government on about November 22, 1942? A. Yes.

Q. Did you have any agreement or understanding as to the amount of money that was to be paid by the government at the time of the taking?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Hotz: We offer to show by the witness that there was not any—

The Court: The record itself shows this is a condemnation proceedings. The offer will be denied.

Q. The Kimball Laundry Company in its present capacity, as I understand the testimony that was given, was really made about 1935, is that right?

Mr. Murphy: Objected to as incompetent and immaterial and not reflecting the testimony correctly, and leading and suggestive.

Question read.

The Court: Bring out the facts directly and do not ask [fol. 277] for conclusions of that kind. When was the present set-up of this property down there completed? What year? A. I think it was 1935, Your Honor?

Q. When was the land purchased upon which the building is located? A. About 1916 or 1917.

Q. And then the building was built at what time?

A. 1924.

Q. Do you recall the cost of the land to you at that time?

Mr. Murphy: Objected to as immaterial, incompetent and too remote in point of time.

The Court: That would be true, Mr. Murphy, if the value of the land was directly involved, and I would say your objection is well taken. But, it is merely an in-

cident. The value of the property is an element as going to the matter involved in this suit, which is not the value of the fee, the value of the use of the fee. Overruled. It might be for the jury to consider, without prejudice in the case, with all the other facts, in view of the liberal rule which I have announced heretofore as being applied by the court. You may answer.

[fol. 278] A. Paid in excess of $50,000.00 for it.

Q. Where, relative to what might be termed the main thoroughfares in the City of Omaha, is the laundry?

A. 15th and Jones.

Mr. Murphy: I don't like to interrupt counsel, but the witness answered before counsel had a chance to object.

Mr. Hotz: Give Mr. Murphy an opportunity to make his objection.

Mr. Murphy: Objected to as incompetent and immaterial and bearing on business, rather than property.

The Court: Objection overruled. Tell us where it is, where it is located in reference to the business district here in Omaha. Many of the jurors, when you refer to the street, do not know where it is located. The location of this property in connection with the business, size of the city—all these things will be elements that a prospective renter and owner, who was willing and desirous of leasing, would surely have in mind. Tell us about it.

A. It is located on the northwest corner of 15th and Jones Streets.

The Court: Where is it from the post office?

[fol. 279] A. Jones is about six blocks south of the post office, off Dodge Street, on which this building is on, and one block east.

Q. In other words, it is one block off 16th Street to the east? A. Yes.

Q. And the Castle Hotel stands at the head of Jones Street, does it not? A. Yes.

Q. And it is one block directly east of the Castle Hotel, entrance of the Castle Hotel? Jones is not cut through beyond 16th?

The Court: We all know where the post office building is, but we all have not been down at the Castle Hotel. That might be out here in Florence, as far as some of us are concerned. Let us stick to the post office.

Q. This post office is on 16th Street and Dodge, isn't it? A. Yes, sir.

Q. What would you say as to 16th Street being a thoroughfare, one of the main thoroughfares in the City of Omaha.

A. It is the main thoroughfare in the City of Omaha.

Q. If you were to pick a corner in the City of Omaha [fol. 280] which was the central corner, what would you say it was?

The Court: You are getting away from the inquiry.

Mr. Hotz: We don't concede that the post office is much of a place, if Your Honor please.

The Court: It is the best place that I have. It will be helpful, Mr. Jacobberger, if, preliminary to your testimony, you tell us something about the business part of the city and residential part of the city, and where the business was derived from. In other words, these elements that go to the location, as a whole, in the value of the property, for the purpose for which you were using it. These are all proper considerations and you are entitled to have this matter placed before the jury. Go ahead and tell us about it. It will save us time.

A. The location of our business is, we consider it, the best possible location for the kind of work we are doing in order to serve the public of the City of Omaha.

Mr. Murphy: I move to strike that answer as a pure conclusion.

[fol. 281] The Court: Sustained. Tell us where your business comes from; where is the residential district; where your business comes from; what is your territory?

Mr. Hotz: And the size of the City of Omaha?

Mr. Murphy: If the court please, I don't like to be interposing objections to questions of the court, but I do want the record to show objection to any testimony as to where their business came from, as a matter per-

taining solely to the value of the business and not the physical structure.

The Court: I do not say so. I say and hold that the location of the property might have something to do with its value, as compared with where the business was coming from. I so hold.

Q. All right. Just tell us, in your own language, about this location.

A. We completely cover the City of Omaha with our routes. We also did a very large business downtown, due to our location, such as commercial work, hotel work, restaurants, railroads, and things of that type.

Mr. Murphy: I move to strike the answer as involving matters not in this litigation, pertaining to the value, [fol. 282] either rental or fee value, of an operating business, and not the value of the use for the purpose of this condemnation of the physical plant.

The Court: The testimony will stand. Objection overruled, and the evidence will be considered by the jury in connection with the value of the property, and for no other purpose.

Q. You heard Al's testimony in the description of the building. Was he pretty accurate in that, as you would view it?

Mr. Murphy: Petitioner objects—

The Court: That was a question of the court's and it is not questioned. I assume it will not be questioned; it may be accepted by all of us as a description of the property. Am I correct in that?

Mr. Murphy: You are correct.

The Court: We will leave that stand as it is without dispute.

Q. What I do want to ask of you, however, is the method that was adopted by you, as president of this organization, as to the condition of the machinery and equipment, and the building, and boilers, and power plant, [fol. 283] and all, as it existed on November 22, 1942. My object in asking the question is to get the condition, the present condition of operability of that machinery at

that time and that building at that time; what was its condition and upkeep as to rehabilitation, replacement, and so forth. Will you answer, please?

A. Every bit of machinery in that plant had been used and it was all used and was just as good as new. Some of it, of course, had been purchased five, six, seven, eight and ten years ago, prior to the taking, but it was kept up in first-class repair at all times.

Q. Was that one of your special duties in connection with the operation of this plant?

A. Not only a duty, but it was a hobby of mine; to have everything in first-class shape at all times.

Q. Just explain, in a few instances, what you meant by that when you talked about replacements and repairs and upkeep being in first-class condition. Just give us a short graphic view of what you were talking about, so that we will know.

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial and adding nothing to the statement al-[fol. 284] ready made that it was in first-class condition and as good as new.

The Court: Sustained. (Noon recess)

Q. In connection with the center of the population of the City of Omaha, the residential section, where is the plant located, as to the north, south, east or west, generally?

A. It is about the center of the city so far as north and south is concerned, and it is up on 15th Street, which would be fifteen blocks west of the river.

Q. What would you say was the fair and reasonable market value of the land in 1942, in November, 1942, in your estimate?

The Court: Without the building, you mean?

Q. Yes, just the plant land alone.

A. I think we set a value of $30,000.00 on that land on that date.

Q. Do you know about the construction of the building? Were you present in Omaha at the time it was con-

structed originally in 1924, and when the new story was added in 1935? Were you present in Omaha? A. Yes.

[fol. 285] Q. And were president of the company?

A. Yes.

Q. Did you have anything to do with supervising the construction of the Kimball Laundry Company?

A. I ordered the construction of it, but I had an architect and engineer as supervisors.

Q. That was John Latenser?

A. That was John Latenser & Son.

Q. And you have a general knowledge of what went into that building as to the style and kind of building?

A. Yes, sir.

Q. You might, in a way, tell us what that is, what type of building.

A. The building is reenforced concrete. At that time we built a building with four stories and half a basement. It had terra cotta trim. It had factory steel windows. We had an elevator in there, and all the other necessary items, like stairways and fire escapes. We had a chute built in that building from the fourth floor on down to the ground floor, a spiral chute that went into the construction of the building. The building was finished with brick on the outside, and then in 1935, we [fol. 286] added an additional story for the expansion of the business. I might say that prior to 1935, I think about 1928, we used only three floors of that building. The fourth floor was up there, but it was not used for any purpose. It was built for expansion purposes. Between 1928 and 1935, it was completely filled with machinery, and then in 1935, we built another story on it for further expansion for our business.

Q. So that the machinery and equipment in the building was not used to full capacity by the Kimball Laundry Company even in 1942? A. Oh, my, no.

Q. It was not? A. No, sir.

Q. What was the capacity of the machinery and equipment and boilers and building, in addition to that which the Kimball Laundry Company was doing?

A. I can conservatively figure we could do thirty per cent more business on a nine-hour day basis than what we were doing by volume.

Q. And you had machinery and equipment in there to handle that additional business? A. As well as the help.

[fol. 287] Q. As well as the help? A. Yes, sir.

Q. What about the power? Did you have the power to carry it on?

A. We had plenty of power and had plenty of everything to do additional business.

Q. Calling your attention to a different exhibit here that the Court Reporter has marked Exhibit No. 30, I will ask you to state what that picture is?

A. Preparation for the construction of the fifth floor, some of the steel work that was laid in conduits above the roof on the fourth floor at that time.

Q. Does that picture show the exposed type of construction? A. It does.

Q. Is that the same throughout the building, to your personal knowledge, on each one of the floors?

A. It was, yes, sir.

Mr. Hotz: We offer in evidence Exhibit 30, to show the inside construction in the process of building.

Mr. Murphy: No objection.

Kimball Laundry Exhibit No. 30, appearing in Volume III, at Page 1075.

[fol. 1075] D. Ex. 30 (Received Photo Described)

Exhibit 30: Picture showing the concrete and steel type of construction of the Kimball Laundry Company building in the process of building.

[fol. 288] Mr. Hotz: I would like to show it to the jury at this time.

Q. Handing you Exhibit 31, I will ask you to state what it is?

A. Electric power control, as well as panel control for individual revolving machines.

Q. And the exhibit you have in your hand, is that a

picture of the electric control room in the Kimball Laundry Company? A. Yes, sir.

Q. Is it completely electrified throughout the entire building? A. It was, yes, sir.

Q. And that was the condition in 1942? A. Yes, sir.

Q. That represents a true picture? That is a picture of your electric control room? A. Yes.

Q. And the panels with the switches? A. Yes, sir.

Mr. Murphy: May I ask one question?

The Court: Yes, sir.

Mr. Murphy: Q. I take it this electric control room and panels are still there, are they not?

A. It is still there in some shape.

[fol. 289] Q. And still being used? A. I don't think so.

Mr. Murphy: Q. Have any of those panels been removed at this time?

A. I couldn't answer that, because I am not over at the plant, but I understand some of them are disconnected.

Mr. Murphy: Q. You don't know what the situation is at present, from your personal observation? A. No.

The Court: When was the picture taken?

Q. I am asking you as of November, 1942? Harry, this is as of November, 1942?

A. They were in use at the time.

Q. That was turned over at the time the government went in? A. Yes, sir.

Mr. Hotz: We offer in evidence Exhibit 31.

Mr. Murphy: No objection.

Kimball Laundry Company Exhibit No. 31, appearing in Volume III, at Page 1076.

[fol. 1076] D. Ex. 31 (Received Photo Described)

Exhibit 31: Picture of electrical control room of the Kimball Laundry Company.

Q. Handing you Exhibits 32, 33, 34, 35, 36, 37, 38, 39 and 40—I will withdraw from your consideration Exhibits 32 and 36, because those were inadvertently put in here, as they were late pictures, after 1942, and I want

[fol. 290] to withdraw from your consideration 32 and 36; of the other exhibits I have enumerated, with the exception of two, please state generally what they are.

A. On Exhibit 33, part of the second floor, showing four-roll flat work ironers, part of a sorting rack off to the left; and on the extreme north end of the building a wash room, although you couldn't identify it from this picture. Exhibit 34 shows part of the third floor, what we call a pressing unit, including the conveyor. It shows the building, type of construction, as well as the windows. Exhibit 35 shows the shirt unit, showing where the shirts are processed, ironed, folded and inspected and ready for the sewing room. Exhibit 37 shows another unit of pressing operations for various garments, such as aprons, coats and jackets, and other finished pieces. Exhibit 38 shows a part of the extracting, taking from the wash room with a conveyor attachment up there where we carry them from the extractors over to the dryers. Exhibit 39 shows extractor and part of wash room on the second floor. Exhibit 40 shows shirt operations, one of the newest units, which was purchased four or five months [fol. 291] before the picture was taken.

Q. Those pictures do not purport to show the entire inside of all of the Kimball Laundry Company, do they?

A. No, they do not, just by leading departments.

Q. It gives a fair idea, however, of the various rooms?

A. Yes.

Q. And the various parts? A. Yes, it does.

Q. Do those pictures reflect about the condition there was there in 1942 when the government took it over?

A. Yes, sir.

Q. And it shows samples of some of the machines that were in use? A. Yes, sir.

Q. In that one exhibit there that has a large—Exhibit 33, it shows a long stretch of what looks to me like a rolling machine. A. Flat work ironers.

Q. What are they used for?

A. To iron sheets and pillow slips and towels, tablecloths, and things of that kind.

Q. What are the girls working at on Number 34? [fol. 292] They are pressing coats and jackets and pajamas and things of that type.

Q. That is from the dry cleaning department?

A. No, that is the laundry department. There is no dry cleaning picture in here in this set of pictures.

Q. What are the girls doing in Exhibit 35?

A. Processing shirts.

Q. What does that mean?

A. Taking them as they come out of the washer to the starcher, and from the starcher they are handed to these women, who have a conveyor attachment along the line and take them after they are starched, iron the collars and cuffs and pass them to a girl who irons the bosom. Another irons the sleeves and another the body, and then finally they come out to an inspector.

Q. Exhibit 37, is that part of the processing of shirts, or something else?

A. No, this is no shirt processing. This is finished work, like jackets and aprons and things of that type, such things that we get a great many of.

Q. You were referring to Exhibit 37? A. Yes.

Q. I will ask you to refer to Exhibit 38 and tell us [fol. 293] what those large machines are there, cylindrical machines?

A. That is a large cylindrical machine called an extractor, in which the clothes are put. It is a steel monel metal basket. It is loaded into the machine by pulley and by centrifugal force takes the water out of the basket, and after the excess water is taken out, lifted by the pulley and carried on this conveyor to the place where it is to be ironed.

Q. Exhibit 39, those large machines there—

A. Washing machines and the other extractor over there.

Q. Those big machines—

A. The cylinders on the left of this extractor are washing machines, two rows of them over there.

Q. And Exhibit 40 is what?

A. That is a shirt machine, one of the new shirt units we had put in a short time before the picture was taken.

Q. You say these reflect some of the parts of the inside of the Kimball Laundry Company as it existed in 1942? A. Yes, sir.

Q. When taken over by the government?

[fol. 294] A. Yes, sir.

Mr. Hotz: We offer those all in evidence, with the exception of the two I noted.

Mr. Murphy: They have all been pretty well shown to the jury already. I take it the offer is for the purpose of showing the construction and not the operation. These are pictures of business operation of employees.

The Court: It is a picture of the building and machinery, not the pretty girls that are there.

Mr. Murphy: For that purpose, we have no objection.

The Court: The jury is not supposed to spend much time looking at the pretty girls.

Kimball Laundry Company Exhibit No. 33, appearing in Volume III, at Page 1077.

Kimball Laundry Company, Exhibit No. 34, appearing in Volume III, at Page 1078.

[fol. 1077-8] D. EX. 33 & 34 (Photos Received, Described)

Exhibits 33 and 34: Pictures of the many rollers used in ironing.

Kimball Laundry Company Exhibit No. 35, appearing in Volume III, at Page 1079.

[fol. 1079] D. EX. 35 (Photo Received and Described)

Exhibit 35: Picture of the shirt department.

Kimball Laundry Company Exhibit No. 37, appearing in Volume III, at Page 1080.

[fol. 1080] D. EX. 37 (Photo, Received and Described)

Exhibit 37: Picture of an ironing room of the Kimball Laundry Company.

Kimball Laundry Company Exhibit No. 38, appearing in Volume III, at Page 1081.

[fol. 1081] D. EX. 38 (Photo, Received and Described)

Exhibit 38: Picture of washroom showing washers and dryers in operation.

[fol. 295] Kimball Laundry Company Exhibit No. 39, appearing in Volume III, at Page 1082.

[fol. 1082] D. EX. 39 (Photo, Received and Described)

Exhibit 39: Picture of washers in operation.

Kimball Laundry Company Exhibit No. 40, appearing in Volume III, at Page 1083.

[fol. 1083] D. EX. 40 (Photo Received)

Exhibit 40: Picture of ironing devices in operation.

Q. For what was the building built?

A. It was originally built for a laundry plant, and after 1933, we had cleaning, so it was built for laundry and cleaning, as well as a lot of specialty work. We did a lot of fine, you might call, hand work, table linens, napkins, and some of the finer linens the people had in their homes, certain curtains of all types. We had special equipment made to handle blankets up there, to practically restore them like new—I think the only equipment of its kind in the middle west. We had a special equipment over there to renovate feathers with. We had equipment to do flat work, as well as family flat work. We had equipment in there to do shirts and all other finishing processes, as well as three different types of family work, that we, at one time called flat damp wash, semi-damp and rough-dry work; and then, of course, the dry cleaning plant, which in itself was a special item. We had a new system, a new method of dry cleaning [fol. 296] called the Zoric System, where they use something different than a gas product. Later on, when it became impossible, or it looked like we weren't going to be able to buy any more Zoric, we put in a gas plant, like ordinary cleaners use, and it is still in the building, both systems. It is my understanding the Zoric plant hasn't had much use in the past three years, and of course, when a thing is not used it deteriorates very rapidly.

Q. The building, itself, could you give us the parts of that building, or method of design that would make it peculiarly adaptable to a large volume of laundry and

dry cleaning business, the parts that would be different from any other building?

A. It was very elastic, and of course, it was departmentalized. We have three washing floors, on the second floor, the third, and fourth floors. The idea was to segregate all various types of work so that when they came in certain types of family wash, they did it on one floor, and had it completely processed on that floor and went down to the delivery room. When it came to a certain type of finished bundle, it went to another floor and was completely finished, washed and finished on that floor, [fol. 297] wrapped and everything. When it came to the specialty work like curtains, blankets, drapes, chair coverings, that was another thing. That was done on a separate floor. Then, the dry cleaning was done separately. The feather renovating was done separately. Besides, we had a cold storage department on the top floor where we stored customers' furs, or fur coats, or anything you wanted stored over a summer or winter season. If something was stored in the fall, it would be taken out in the spring, and if it was stored in the spring, it would be taken out next fall. There was a cold storage plant over there.

Q. In connection with the steam lines, the electric lines, the boilers, the capacity and size of the boilers, all those matters, were they installed; I will put it this way: Would they be usable for anything else but laundry and dry cleaning?

Mr. Murphy: Objected to as incompetent and immaterial. There is no question but what this is a laundry plant and that is all that is involved.

The Court: I think that can be inferred without any dispute and that is what he bought them for and that is what he was using them for.

Q. Did those boilers run all the way up to the top of the building from the ground floor?

[fol. 298] A. Those boilers were specially built, the building was specially built to take care of that type of boiler. It was something new, and in fact, I think they were the

only boilers of their kind operating in the city of Omaha. They were patented by a local man and they were the most efficient boiler for our type of operation that could be bought at that time. We had one boiler that had a 225 horsepower, on which we have developed, for months at a time, 500 horsepower, and another 300 horsepower that would develop 600 horsepower. We used only one boiler at a time, the small boiler in the spring and summer, and the larger in the fall and winter. That gave us all the steam necessary to heat all of our water for all of our machines.

Q. Does that boiler run from the ground floor to the top?

A. The boiler room is within four to five feet of that ceiling and I imagine that ceiling was about twenty-eight feet high. I don't remember the exact dimensions of the boiler without getting the records.

Q. Naturally in the laundry business there is a great deal of hot water that has to be used?

[fol. 299] A. Yes.

Q. What was the capacity of that plant in reference to hot water and the piping of hot water throughout the building?

A. We could heat water at the rate of fifteen thousand gallons a minute,—I mean, an hour.

Q. Fifteen thousand gallons an hour?

A. From fifty-five degrees to one hundred eighty degrees.

Q. And that was piped through the building?

A. That was piped—first, it went through the—let me explain that to you gentlemen. Our water came in first from the city line, through a softener, and from the softener went through a reclaimer. The reclaimer is sort of a preheater that was sunk in the floor in a pit, in which all the wash water coming from the gutters of these washing machines would flow into and heat some of that wash water, which would be around one hundred degrees, which would be absorbed by the cold water going through copper coils and on up to the roof, where it

would go into a heater that contains exhaust or live steam, but after that got to one hundred eighty degrees heat that would go into a storage tank, a ten thousand [fol. 300] gallon storage on the roof, and from there on piped back down to the wash room, or any source where hot water was necessary, so we always had a source of ten thousand gallons heated of hot water, as well as cold water.

Q. What was the capacity, total amount of gallonage of water of that plant per day?

A. We had a softening capacity of about 225,000 gallons a day.

Q. In other words, you could soften and run through the pipes, 225,000 gallons per day of water?

A. Both kinds of water, hot and cold, yes.

Q. Did you ever use that much? Were you ever required to go that high? A. No, never did.

Q. How high did you go?

A. I think we used 160 to 170,000 gallons; maybe there were some days when we used 200,000 gallons.

Q. Do you know whether the army used it to full capacity? A. I do not.

Q. Would Al know that? A. I am sure I don't know.

Q. But you don't know? A. No.

Q. Did it take special plumbing to handle this ex- [fol. 301] tremely hot water, special ducts, or pipes through which it went into the different parts of the building?

A. No, regular cast iron pipe; regular iron pipe; mostly galvanized pipe, however.

Q. But they would be for laundries; they wouldn't be in an ordinary building for steam heating; they were different than the ordinary steam heating?

A. It had to be a very good pipe that wouldn't throw off any rusts.

Q. Why do you say that the pipe had to be so it wouldn't throw off rust?

Mr. Murphy: Objected to as incompetent and immaterial.

The Court: Yes, sustained. Rust deteriorates certain pipe, we know that, but it is not involved here. Let's go on with the case.

Q. What is the kind of water that must be used in, or was used, rather, in the Kimball Laundry Company for its laundry work? Is it ordinary water which comes out of the pipes of the city, or did it have to be processed, or did you, in that particular plant, do it?

A. Our water was processed as it came in the plant from the city pipe line. It was all softened.

[fol. 302] Q. Have you had an opportunity to travel about the country and see laundries in this community and elsewhere?, A. Yes, sir.

Q. To what extent?

A. For a great many years I was making conventions in the various parts of the country. I developed a lot of ideas and I had to go and talk about a lot of new ideas and theories in the practice of laundry work, so I got to see a great many laundry plants all over the United States, up to about 1935, at which time I delegated that part of the business to my brother.

Q. Did you ever hold a position as an officer in the National Association of Laundrymen? A. Yes.

Q. What was that?

A. Vice-president and member of the Board of Directors.

Q. Are you able to tell us, as a comparative matter, the size and capacity, for instance, of the Kimball Laundry Company with other laundries throughout this area, as compared with others in this area, so far as capacity is concerned? In other words, was this an outstanding laundry, or was it just an ordinary laundry you would [fol. 303] find in a town of this size?

Mr. Murphy: Objected to as incompetent and immaterial; calling for a comparison, and not tending to prove or disprove any issue in this case.

The Court: I think it is material here, perhaps, to show the effect of the location. If he knows where other laundries are and he proposes to tell us the value, it supple-

ments his qualifications as owner. It goes to his knowledge of laundries and how they are being used. I shall overrule the objection.

A. The Kimball Laundry Company, in this area, and when I say "this area" I mean west of Chicago, and I say clear to the Pacific coast, is considered the outstanding model plant. I know it is the practice of most of the machinery salesmen to bring their prospects anywhere in this territory to see the machines they want to sell in operation in our plant. We are considered a model plant by practically every laundry owner, even in Chicago, St. Louis and Kansas City, and places of that type. In fact, they used to say that they thought I was crazy for keeping up a plant of that type, sort of a show-room plant. It [fol. 304] was my hobby. I enjoyed it.

Mr. Murphy: I move to strike what he thinks it was. It is calling for a conclusion.

The Court: That is very true, but I don't know that it is damaging or not on either side. It is just a comment. It is pretty hard to separate that which is comment and proper. Overruled. Let it stand.

Q. Was it the biggest laundry in Omaha?

A. The biggest laundry within five hundred or one thousand miles of Omaha.

Q. By biggest, you mean capacity? A. In capacity.

Q. And facilities for doing laundry work?

A. That is correct.

Q. I suppose you are familiar with the machinery and equipment that was in that plant on November, 1942, is that right? A. Yes, sir.

Q. You, no doubt, have seen this Exhibit 21. This is the one that contains the list of all the machinery and equipment in there, both as to cost and the value of it on November 21, 1942, and on November, 1945. What would you say, Mr. Jacobberger, was the fair and reasonable market value of that machinery, exclusive of the [fol. 305] power equipment, as installed in that building in November, 1942, at the time it was taken over by the government?

A. It is pretty hard for me to retain those figures in my head, but I know in excess of $220,000.00, it seems to me.

Q. Here is the exhibit, if that will help you any.

A. We had a value of $273,831.00 as of 1942.

Q. Does that meet with your approval as to your value? Do you think that is high or low, or how does that strike you?

Mr. Murphy: I think I will have to object to that.

The Court: It is not the proper inquiry. Does he have an opinion of his own with reference to his value of the machinery? He says he does, and what was that opinion and how does that compare with the figures in Exhibit 21? That is the proper way to proceed.

Mr. Murphy: Withdraw the objection. Let's move on.

Question read:

A. It is my judgment it is a very conservative value. These values were based on the new value, less depreciation that we have taken off that we were allowed to [fol. 306] take off for income tax purposes, which, in my judgment, does not reflect the true depreciation. In other words, I mean to convey this thought, that the $273,831.39 does not reflect the true value of that equipment.

The Court: As of that date? A. As of that date.

Mr. Murphy: I move to strike that answer as an attempt to impeach their own witness.

The Court: That will be overruled. What is your opinion of the true value of the property? That is what we are inquiring about.

A. I might answer in this way, Your Honor: I think I stated before that I only had one thought in mind, this plant. This business I created was my baby. I did everything I could to keep everything in the same condition at all times as when I purchased the machinery. I never let a thing go wrong with it. My judgment is, and I have made this statement repeatedly in the past to people who were interested in purchasing the equipment: That machine I paid $1,000.00 for; it has been in there five years, but it is still worth $1,000.00 to me because it is still per-

forming all right like it did five years ago when I bought [fol. 307] it. The upkeep was there. There wasn't a thing wrong with it. Even the paint was there. We kept the thing there like new all the time.

The Court: We are arguing the matter. If we should not accept the figures in column two there on Exhibit 21, what do you say they should be?

A. I think they should be in excess of $300,000.00.

The Court: Is that your opinion of the value as of that date? A. Yes, Your Honor.

Q. As to the building, what would you say was the fair market value of the building as it stood in 1942?

A. Again I would have to refer to the book. We have one value on the books, a depreciated value, based on depreciation taken.

Q. You mean depreciation for income tax purposes?

A. Yes, sir. That building, after we had our engineers check this place, was valued at $280,000.00.

Q. $280,000.00? A. A reproduction value.

Q. What would you say as to that figure in connection with its fair value of that building in November, 1942, the sum of $280,000.00?

[fol. 308] A. Yes, sir.

Q. You concur in that? A. Yes, sir.

Q. We have in this building that you have been talking about, power equipment, what is known as power equipment; that is, the boilers, water softeners, and similar installations that have not been taken into consideration in the exhibit that you have in your hand. Do you have in mind the valuation of that power equipment separately, or included in the other machinery and equipment?

A. Separately.

Q. It is all separate? A. All separate.

Q. What do you say was a fair and reasonable value of the power equipment, including the boilers?

The Court: At the same time?

Q. Yes, in November, 1942?

A. Between $80,000.00 and $90,000.00.

Q. Installed and in place as in an operable condition, is that right? A. That is correct.

Q. Have you had occasion to make inquiry into the condition of the building at the present time, speaking of the building as such now, the structural condition, after [fol. 309] the army has been in there during this period of time, so that you could testify what you believe it will cost to make the necessary structural repairs to that building to bring it back as near as possible in the condition it was in November, 1942, and I wish you would tell us about that and give us the items you have in mind. You will find nothing on that exhibit you have there. That has to do with something else. That is the machinery and equipment.

A. During the past thirty days I have spent considerable time in and outside of the building to find out what it would require to restore that building in as good condition as it was the day of taking, and I have been trying to get estimates ever since for the work that has to be done to the building, and I find estimates are constantly going up. The [redacted]ger we seem to wait on this thing, the higher the rates come on these estimates. For instance, I received an estimate this morning on the painting of that building. It hasn't been painted since 1941. The estimate was $17,000.00.

Q. How much?

[fol. 310] A. Over $17,000.00, just the painting of the building. I received an estimate to put in gutters on two floors in the wash rooms, of $5,800.00. That doesn't allow for taking up the old guttering, which we would have to do ourselves, and furnishing the grids. I know it would cost $1,500.00 to $2,000.00 just to do that work. I have been trying to get estimates to replace some of the windows, terra cotta, sidewalk, fire doors, the repairs on the elevators, which have not yet come in, but I can come pretty close to it.

Q. Let us have your best estimate.

A. Al and I talked about it and we thought $25,000.00 would cover it, but later on we found it ran nearly

$35,000.00. I am beginning to believe it is going to run in excess of $40,000.00 to $45,000.00.

Q. You started out to give us these items. You said painting would be about how much? $17,000.00?

A. Over $17,000.00.

Q. We will say $17,000.00. The next item would be the guttering and what would be that item?

A. I have it right here, to be exact, $5,837.00.

Q. That is for what purpose, the guttering?

A. Just for two wash rooms, but let me read you the rest of it, if I may.

[fol. 311] Q. Give us your estimate.

A. "The above price is based on your furnishing us the metal grids and removing the present flooring; repairing all concrete work on both gutters, floors, and posts; making sharp angles at all points throughout the gutters. Also the free use of your elevators for the hoisting of all materials from the ground to the floors."

Q. What do you say was the cost to the Kimball Laundry Company? A. $1,500.00 to $2,000.00.

Q. Going to the next item of repairs to that building.

A. Those are the only two items I have.

Q. I know, but you stated you could estimate, from your experience, what it would cost.

A. I talked with some of the building suppliers about terra cotta and labor for putting it up there, and one man says, "Well, I think it will cost in the neighborhood of $5,000.00 to replace the terra cotta and to point up the chimney." I understand the chimney now has a crack. We have a 120-foot, four-foot stack that has a crack from top to bottom that wasn't there in 1942.

Q. That would be $5,000.00?

[fol. 312] A. Yes, sir. Then, of course, there are the fire doors, fire doors on each floor, and the doors are practically completely rusted out. Not only the doors, but the frames. They have to be kept painted up each year or they rust through.

Q. Because in a laundry there is so much dampness and steam and wetness all the time? A. That is right.

Q. And the result of those doors not being properly painted and taken care of each year, has caused their present condition, is that right? A. Yes.

Q. What do you find will be the expense of replacement of those doors?

A. Well, all the doors would cost in the neighborhood of $300.00 to replace them. I don't know what the labor will be, but I know that will be what the doors will cost.

Q. $300.00, is that right?

A. I am not even certain about that price. I just got that talking to some fellows. We have to find from our suppliers what they will bid on it. None bid on it yet.

Q. How about steel window frames?

A. In some cases they will have to be replaced. In [fol. 313] most instances all they have to do is scrape the rust off and then have to put some rustproof paint on them.

Q. Have you an estimate as to the value of that?

A. No.

Q. What is your estimate as to what it would cost?

A. I wouldn't want to say. I haven't any idea.

Q. Do you suppose you could make up your mind and get it for us before we conclude this week?

A. I have been trying for a week to get that.

Q. Give us the balance of those items that you have in mind.

A. We have in mind the elevator. The doors are very loose, the grooves where the elevator control runs up and down are very loose. When we operated that plant we had a service on that plant by the month on which they made a monthly charge, the Otis Elevator Company. I don't know what the government did, whether they were ever checked, but we had the cables and everything checked every month in A-No. 1 condition.

Q. What is the condition now of the doors?

A. They are pretty shaky. I haven't any idea what it would cost to fix it up, but I know it will run pretty close to a thousand dollars.

ol. 314] Q. And you are going to get more accurate ures, if you can? A. Yes.
Q. What would you say about the estimate that was ade by Al of $35,000.00 to repair the structural defects d so forth to the building and fix it up as you have stified here? Would that $35,000.00 meet with your approval as to value, or is it too high or too low, and if in what particular?
A. I think it is considerably low. I think it will be arly $40,000.00 to $42,000.00, or it might go even to 5,000.00.
Q. But it is at least $35,000.00? A. At least $35,000.00.
Q. About the power equipment, the boilers and such; at is, the water softeners, and like that, can you tell us at it will cost in your estimate to replace those or to ing them up to the valuation they had in 1942?
A. I can't give you an outside figure on that because haven't any estimate from the softening people and the finite people will have to come and take the softener wn completely. After four or five years of operation, ose little strainer header valves have to be taken out and ol. 315] replaced. The inside of the shell of this cylinr is about seven feet in diameter and about five and e-half feet high. They have to put a coating on that prevent rust. They put something in there, and then at mineral has to be put back in again and repainted, d nothing has been done during the past three years.
Q. Al said the difference was $32,667.55 on that power uipment. Would you say that figure is too high or low, d if so, state in what particulars?
A. If that power equipment is going to include a heater the roof, which is a total loss, as well as the reclaimer d lower part of the power room, and the boiler, I will y it is way low.
Q. That is, it is at least $32,667.55? A. Yes, way low.
Q. What do you think it should be?
A. About $45,000.00.
Q. What were you talking about on the roof?
A. We have a copper-lined heater over th e, in which of our water was heated to one hundred eighty de-

grees before it went into the storage tank. That has been ruined by neglect and improper operation.

Q. What is the value of that?

[fol. 316] A. When we put it in, I forget just what it cost. Maybe Al could tell, but I think around $5,000.00, plus drayage and installation.

Q. You were testifying from some letters that you had in your pocket, apparently in connection with some of these estimates. Do you have those letters with you in your possession, some of them? A. I have.

Q. Would you please produce them? State now just which letters they are, from whom, giving the name of the company and the specific amounts, if you will?

Mr. Murphy: That is objected to as calling for hearsay testimony.

The Court: Sustained.

Q. Calling your attention to Exhibits 41, 42, 43 and 44, I will ask you to state if those are estimates which you procured, that are in the form of offers to do work in the matter of the restoration of the building known as the Kimball Laundry Company, in reference to which testimony has been given, and if those letters are signed by firms that offer to do the work for the sums therein specified? A. They are.

[fol. 317] Mr. Hotz: We offer those four letters in evidence and ask leave to substitute copies after while.

Mr. Murphy: As to Exhibits 41 and 42, which are estimated prices for doing repair work, I should like to inquire of counsel whether he will grant us the same courtesy in two or three instances if we submit written bids from reliable local men?

Mr. Hotz: Yes.

Mr. Murphy: I will not object.

The Court: Let the record show that both parties have obtained estimates of the cost of construction and certain repair work in connection with the building, and that it is now agreed mutually that these written estimates, these estimates being in the form of written documents, may be received in evidence.

Mr. Hotz: Without further identification.

The Court: Without further identification, or without objection as to foundation.

Mr. Hotz: That is right.

Mr. Murphy: We agree to that so far as they pertain to construction and repair, and that includes 41 and 42. Now, petitioner does object to Exhibits 43 and 44, and [fol. 318] each of them individually, for the reason that these two exhibits and each of them are not repair to the building, but prices on new machinery and equipment and throw no light on the present value of the particular type of equipment, no showing that they are even the same type of machinery that was there, or is there now.

Mr. Hotz: May I ask the witness a few more questions?

The Court: Yes, sir.

Q. In connection with Exhibits 43 and 44, you heard the objection of counsel, did you? A. Yes, sir.

Q. Just explain what Exhibit 43 is and what it proposes to supply, naming it, and on what does it pertain to in the building down there?

Mr. Murphy: Object to that as not the best evidence. The exhibit describes what it is and what it applies to.

Q. Did you ask for the bids from that concern? A. Yes.

Q. The letters, 43 and 44? A. Yes.

Q. What did you ask for bids on?

The Court: You have the letters. Put the letters in. [fol. 319] They will speak for themselves.

Mr. Murphy: I am not objecting to those two for the reason of absence of identification, but solely on the ground that they pertain to installation of new machinery, and no evidence that the machinery therein described is even the same type of machinery to be replaced.

The Court: What do you base your objection on? Something contained in the letter? Let me see it.

Mr. Murphy: They are bids on new machinery and we don't know whether they are the same type of machinery, and that is the new cost, and not the present value.

Mr. Hotz: I will have to ask the witness. I can't obtain that information from anyone else.

The Court: You must ask him proper questions. Find out what Patterson Combined Storage Tank and Heater size 72" is, whether it has any bearing to your Exhibit 44, and so on.

Q. With reference to Exhibit 44, you have heard the statement of the court. What does that refer to? Tell us, in the equipment down there, just what it refers to.

The Court: What it refers to? I am talking about the [fol. 320] Patterson Tank. What is the Patterson tank?

A. Patterson-Kelley Company.

The Court: What does that have to do with the list of the machinery that was in your plant when they took it away from you?

A. There was a Patterson-Kelley machine in there that had been destroyed in the past three years and now it has to be replaced with identically the same type of machinery.

The Court: Let's go on with the next item you referred to.

Q. That is described in what exhibit?

A. In 44, and I would like to make this one exception. The one we have now is a copper-lined heater. The one we are getting is not a copper-lined heater, because they are unable to obtain the copper, but they claim they can make a heater that will not rust. We have to take that chance, so we are not getting as good a heater as before.

Q. What is the cost as given in the letter?

Mr. Murphy: Objected to as not the best evidence and same objection to the exhibit which has not yet been ruled on.

The Court: I am trying to see if you can lay a founda- [fol. 321] tion and connect it up so that Mr. Murphy will withdraw his objection. If he insists on his objection, of course, I must require you to produce the men who wrote the letter and made the estimate and can identify it. This is a machine to replace one that is missing. I don't see why you can't agree to that.

Q. Do either Exhibits 43 or 44, or both of them, refer

to any of the items on Exhibit 23, which is a list of the power equipment? A. They do.

Q. Please state what items.

A. Heat reclaimer for $4,800.00, and an item of hot water heater for $5,500.00, on Exhibit 23.

Q. As to the exhibits you have in your hand, which has the reference to the two items you spoke of?

A. Exhibit 44. I think I should read you part of this paragraph.

Mr. Murphy: I think I can settle this in a moment, if I may ask the witness a question.

The Court: Very well.

Mr. Murphy: Q. Does one of your exhibits, 43 or 44, pertain to a heat reclaimer? A. Yes.

Mr. Murphy: Q. Is that the same type of heat re-
[fol. 322] claimer as you had there before and as is referred to on Exhibit 23?

A. That is what they state in the letter will be the same type.

Mr. Murphy: Q. Which exhibit number?

A. I think that is 44. I want to be sure about that. The heater on the roof is on 44, and the other is on 43.

Mr. Murphy: Q. Is 43 a heater or heat reclaimer?

A. Heat reclaimer.

Mr. Murphy: Q. Is Exhibit 43, which you have in your hand, describing or referring to the same type of heat reclaimer as you had there previously and is referred to on Exhibit 23, same capacity exactly?

A. Same capacity exactly.

Mr. Murphy: Q. Are those two exhibits, 43 and 44, do they reflect the cost installed of complete new machines; that is, a new heat reclaimer and new hot water heater?

A. Price quoted is F. O. B. Omaha.

Mr. Murphy: Q. You misunderstand me. They refer to new machines? A. Yes.

Mr. Murphy: Q. To replace these used machines?
[fol. 323] A. Yes.

Q. And you were referring, were you not, in your testimony in reference to Exhibit 23, of two machines that

are listed on that exhibit as "damaged beyond repair," or destroyed, is that right? A. That is correct.

Mr. Murphy: We will at this time withdraw our objection. We do suggest and request the court to keep in mind in the instructions the question of new for the used.

The Court: Certainly. You can go into that matter on cross-examination and deal with the matter with your own machine men or experts that you have here. What we are trying to do is to discover what the damage is and if it takes new machines to replace them. That is what we figure.

Kimball Laundry Exhibit No. 41, appearing in Volume III, at Page 1084.

Kimball Laundry Exhibit No. 42, appearing in Volume III, at Page 1085.

Kimball Laundry Exhibit No. 43, appearing in Volume III, at Page 1086.

Kimball Laundry Exhibit No. 44, appearing in Volume III, at Page 1087.

[fol. 1084] DEF. EX. 41 (Received)

NATIONAL ROOFING COMPANY
Incorporated
Roofing and Waterproofing Contractors
Jobbers of Roofing Materials
Established 1878

Omaha — Sioux City
Council Bluffs — Sioux Falls

323-29 Sunderland Building
Phone Jackson 0551
Omaha, Nebraska

Kimball Laundry
15th & Jones Street
Omaha, Nebraska

March 4th, 1946

Gentlemen: Att: Mr. Jacobberger

The writer has made an inspection of the North end of the second and third floors, where the present mastic floors have been worn out.

We agree to replace the present floors, forming new asphalt mastic gutters in all places where gutters are in at the present time; and setting all metal grids; also new 4" fillets around all walls, columns, and posts; all for the sum of FIVE THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLARS ($5,837.00).

The above price is based on your furnishing the metal grids, and removing the present flooring; repairing all concrete work on both gutters, floors, and posts; making sharp angles at all points throughout the gutters. Also the free use of your elevators for the hoisting of all materials from the ground to the floors.

The above quotation is also based on the use of one-half of the North alley, the entire width of the property.

The above price is based on present market prices on both material and labor, and in case there is any appreciable rise in either, or both, before the job is completed, same will be added to the above cost.

No work of any type or description is contemplated in connection with the asphalt mastic work on the fourth floor, and any work that is done on this floor will be an extra, based on the time and material it takes to do the necessary repairing.

Very truly yours,
NATIONAL ROOFING COMPANY
By N. E. Dow (Signed)
President

[fol. 1085] D. EX. 42 (Received)

RAY ISARD JACKSON 7200

ISARD PAINTING & DECORATING COMPANY

"Painting In All Its Branches"

1409 Jackson Street
Omaha, 2, Nebr.

March 6, 1946

Kimball Laundry
1504 Jones Street
Omaha, Nebraska

Gentlemen: Attention: Mr. A. L. Jacobberger

We agree to do the painting on the exterior and interior of your building located at the above address, as follows:

EXTERIOR: To thoroughly wire-brush and scrape all loose paint and rust before repainting.

To paint all metal doors, steel sash, iron ladders leading to the roof, iron sidewalk door, area grating, iron grilles on alley side, garage doors and all iron work pertaining to the fire escapes with one coat of metal protective paint.

The four oak front doors to be thoroughly washed, touched up where necessary, sandpapered and given two coats of spar varnish.

INTERIOR: *Sash:* All rust on steel window sash and doors leading to the fire escapes to be thoroughly sandpapered to remove same before repainting, touched up with metal primer where necessary and given one coat of metal protective paint.

Wallwork: All work to be painted shall be washed with an approved solution to remove the dirt. All loose or scaley paint to be removed.

All ceilings, walls, columns, pipes, package chutes, conveyor tracks, light brackets and other work down to the dado to be given one coat of pigmented oil-base primer and one coat of semi-gloss enamel.

The dado, walls and other work up to the wall color to be given one coat of enamel undercoat and one coat of gloss enamel; colors to be selected.

A stripe, color and width to be selected, to be run between the wall color and dado.

All doors and trim to be given one coat of enamel undercoat and one coat of glass enamel.

The laundry machinery is not included in this estimate.

We agree to complete this work as specified above for the sum of Seventeen Thousand One Hundred-Twelve Dollars and Fifty Cents ($17,112.50).

This estimate includes our furnishing all labor which shall be strictly Union, materials, equipment, supervision, State and Federal taxes, workmen's compensation, public liability, property damage and personal property dam-

age insurance necessary to complete this work in a first-class manner.

We hope that this estimate will meet with your approval and that we may be favored with your order for this work at an early date.

Yours very truly,
Ray Isard (Signed)
ISARD PAINTING & DECORATING COMPANY

[fol. 1086] D. EX. 43 (Received)

Heat Exchangers, Water Heaters, and Equipment for Chemical, Process and Oil Industries

THE PATTERSON-KELLEY CO.
Incorporated
Heat Transfer Engineers and Manufacturers
East Stroudsburg, Penna.

Established 1880 Railway Exchange Building
Tel. Harrison 0158 Chicago, 4.

All agreements contingent upon strikes, accidents or delays beyond our control, and the approval of an executive official of the company at East Stroudsburg, Pa. All quotations subject to change without notice.

February 28, 1946

Kimball Laundry Company
Omaha, Nebraska
Gentlemen: Att: Mr. H. A. Jacobberger, President

We have pleasure in enclosing in duplicate proposal covering the copper silicon shell heater or Everdur as is the commercial name for this material, also proposal covering the heat reclaimer.

The Everdur shell heater will be built with two separate tube sections, one to receive the exhaust steam from the air compressor and boiler feed pumps and the condensate from this section can be run into the heat reclaimer pit or to the nearest sewer connection as the writer doubts if there will be much heat left in this condensate.

The high pressure heating section will be of capacity to take care of the future 25% increased load and is based on heating 10,000 gallons of water per hour from 40 to 180 degrees with 60# steam, all as the writer's

memoranda indicate was the capacity arrived at in our discussions. This capacity will enable you to carry on during emergencies should the wooden tank cause trouble. Being under automatic control it will only take whatever live steam is required to keep the water at the proper washing temperature. As requested, we have included all accessories.

With reference to the Reclaimer, the writer has had the factory redesign this so that the horizontal spacing between the tubes is greater than in your present machine which will help retard fouling, will make it easy to keep clean and will add to the efficiency.

The additional 3" depth over the machine you now have would only require that you raise the level of the overflow pipe so that the upper tubes will always be covered with the soiled water and the extra 6" in length will fit in the pit okey, we are sure.

We also want to remind you that at the corner of pit where soiled water enters a dam should be built across the corner from the bottom up to the same level as the overflow pipe so that the soiled water will flow over this dam in a more quiet manner thereby doing away with the turbulence now created in the pit by water falling from the higher level which destroys stratification and impairs efficiency.

We will of course furnish blue prints or whatever other information you may want and we will ask Factory to furnish sketch of efficient strainers for the soiled water.

The writer has carefully gone over all the memoranda he made while in conference with you and we believe the proposal covers the equipment as you would like to have it. The only change is in the design of the Reclaimer which is our latest and is beneficial.

Trusting this meets with your approval and assuring you of the writer's best cooperation, we are

Yours very truly,

DL/cg CC-Str.
CC-Mr. Wain 2-copies

The Patterson-Kelley Co.
By Daniel Lewy (Signed)
Daniel Lewy

[fol. 1087] D. EX. 44 (Received)

Heat Exchangers, Water Heaters, and Equipment for Chemical, Process and Oil Industries

THE PATTERSON-KELLEY CO.
Incorporated
Heat Transfer Engineers and Manufacturers
East Stroudsburg, Penna.

Established 1880 — Railway Exchange Building
Tel. Harrison 0158 — Chicago, 4.

All agreements contingent upon strikes, accidents or delays beyond our control, and the approval of an executive official of the company at East Stroudsburg, Pa. All quotations subject to change without notice.

February 28, 1946

Kimball Laundry Company
Omaha, Nebraska
Gentlemen: Att: Mr. H. A. Jacobberger, President.

We hereby propose to furnish one Patterson Combined Storage Tank and Heater size 72" [illegible] diameter by 174" long, a duplicate in overall dimensions of your present heater. The shell of this heater will be made of Everdur. It will be built for a water working pressure of 100# p. s. i. based on a factor safety of four. It will be of welded Construction, the welding process being in accordance with the ASME Code for Unfired Pressure Vessels. Shell will be 3/8" thick with 1/2" heads. It will be provided with a reinforced manhole at tail end complete with yoke, crab and gasket. All necessary openings of suitable size and location will be provided and heater will have cradles for support.

The heater will contain a series of U-shaped seamless drawn copper tubing 1¼" o.d. 16 BWG. This heating element will be divided up into two heating units with the tubes expanded into the same tube sheet. One heating section will be built to receive the exhaust steam from the boiler feeder pumps and the compound air compressor.

The live steam heating unit will be under automatic control and will be of capacity to heat 10,000 gallons of water per hour from an initial temperature of 40 degrees to a final temperature of 180 degrees when supplied with live steam at 60# pressure. The copper tube heating sections will be provided with a bronze tube support at the overhanging end which not only supports the tubes but keeps them in perfect alignment.

Steam openings will be provided with special distributor so that steam fills all the tubes thus preventing short circuiting

Along with this heater we will furnish one Powers Thermostatically Controlled automatic steam valve #11 size 3" stainless steel trim for the high pressure steam. We will also furnish one # 535 size 2" Illinois Engineering Steam trap of proper capacity to take care of the condensate from the live steam section. Heater will also be provided with a 2" relief valve, vacuum breaker, Patterson dial type thermometer and a high pressure thermostatic air valve.

Heater is complete in every detail excepting ordinary pipe and fittings for final connections.

The price for this heater complete with all accessories is $5,024.00 f. o. b. Cars, Our Works, East Stroudsburg, Penna. with full freight allowed to Omaha. Shipping weight 7,850#.

We also propose to furnish one Kelley Reclaimer 45" wide by 77" high by 15'-6" long. The tubes on this Reclaimer will be spaced 2¾" horizontally and 2" vertically.

The design will be of our latest improved type having an excellent counter flow principle and will be of a multipass construction, the cold water entering at the bottom and passing thru a series of tubes gradually working its way upward through the various passes while the warm soiled water is gradually sinking so it can pass down underneath the exit dam.

This Reclaimer is guaranteed to raise the temperature of 10,000 gallons of clean water per hour from an initial temperature of 55 degrees to a final temperature of not

less than 95 degrees when supplied with 15,000 gallons of soiled water entering the Reclaimer pit at a temperature of 110 degrees.

The cost of this Reclaimer with regular steel tube sheet is $5,136.00, freight allowed to Omaha, Nebraska. Shipping weight 15,200#.

In case it is desired that this Reclaimer be provided with an Everdur tube sheet then add to the above cost the sum of $504.00.

Blue prints of both heater and Reclaimer will be furnished for approval so that the size and location of all openings may be made to best accommodate the arrangement of piping at the plant before completing shop work.

Respectfully submitted,
THE PATTERSON-KELLEY CO.
By Daniel Lewy (Signed)
Daniel Lewy

DL/cg CC-Str.
CC-Mr. Wain
2-copies
Accepted.....
By.....

[fol. 324] Q. Exhibit 42 is the estimate of the paint job, is it not, from the Isard Painting & Decorating Company of Omaha, Nebraska? A. Yes, sir.

Q. What is the estimate that is given there in that Exhibit 42? A. $17,112.50.

Q. And Exhibit 41, that pertains to what?

A. Agrees to replace present flooring, new asphalt mastic gutters in all places where gutters are in at the present time on the two floors; also four inch fillets around all walls, columns, and posts; all for the sum of $5,837.00, but the above price is based "on your furnishing the metal grids, and removing the present flooring; repairing all concrete work on both gutters, floors, and posts; making sharp angles at all points throughout the gutters. Also the free use of your elevators for the hoisting of all materials from the ground to the floors."

Q. And you estimate that to be $1,500.00 to $2,000.00?

A. Yes.

Q. Were there any additions that come to the boilers and heat reclaimers, shown on Exhibits 43 and 44? Was there other or additional expense that you would have [fol. 325] for installation, other than those set forth in the letter?

A. Oh, yes, on the other two items over there, the heat reclaimer, as well as the heater.

Q. What are they?

A. I haven't a bid on the hoisting of that one heater. That weighs something like twenty thousand pounds, or more, and hoisting it five stories, taking out the walls, the cover has to be removed, things have to be disconnected and let down on the ground and hauled away, and the new one connected, again covering with asbestos, making connections, steam connections, and water connections, and again putting in the walls, and I think a conservative estimate for that work is around $3,000.00.

Q. And that is in addition to the sums specified in Exhibits 43 and 44?

A. Yes, for the one unit, not the reclaimer.

Q. Tell us about the reclaimer.

A. The reclaimer won't cost so much to install because all they have to do is haul it from the cars and take the old one out and lower the cinder pit and make connections and it is ready to go. I don't think that should cost over $500.00.

[fol. 326] Q. Is there some of the machinery in that plant that must be returned to the factory to be repaired that can not be repaired in this city? I mean laundry machinery and equipment?

A. In my judgment, I would think most of the washing machines should be returned to the factory to be properly repaired. They cannot repair them on the floor.

Q. Why is that?

Mr. Murphy: Objected to as calling for expert testimony of the witness; no foundation laid.

The Court: Overruled. I think he is an expert on laundry matters. It is all he has been doing all his lifetime.

If that doesn't make an expert I don't know what will. Overruled.

A. The washing machine is made up of an inner and outer shell. The inner revolving cylinders are all monel metal. They run on roller bearings, or ball bearings, whatever they may be, and they are either welded or riveted. They have sliding doors on them. By constant use the doors wear so that the garments, in the going back and forth, get caught in the door and tear. Those doors are badly worn and not replaced, I suppose, because they couldn't get them, but the shell itself is pretty [fol. 327] well out of line in some places. The rivets are sprung, bearings pretty badly worn, and from the best information I have been able to get, they say we ought to return them to the factory for complete overhauling, but in some instances, they have also told us it would be cheaper to buy new ones than to have all that work done.

Q. The man who made the estimates in connection with the value of the machinery as installed, in Exhibit 43, the way you went about this was to have men to estimate, experts to come here and estimate what it was worth today, the latter part of 1945, is that right? A. Correct.

Mr. Murphy: Objected to as incompetent and immaterial; not the best evidence; the witness having been here and testified, and the exhibit itself being the best evidence of what it is.

The Court: Sustained.

Q. What would you say was the fair value in the city of Omaha on November 22, 1942, of a temporary use that would be made of the Kimball Laundry Company including the land, building, machinery and equipment for a term that would be put to you at that time of three and one-half years, or three years and six-tenths months; [fol. 328] that is, a term for temporary use for the whole thing as it was as a unit, for the use of the United States Government, let's say, or any similar person that had necessity for an immediate use?

The Court: You say six-tenths months. Is that what you mean? You mean six-tenths of a year.

Mr. Hotz: It is three years, six months and eight days.

The Court: Seven months and eight days, or three years and six-tenths of a year.

Mr. Hotz: That is what I had in mind, three years and six-tenths months.

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial, for the reason that it is not evidence of the fair market value or fair rental value or the use value of the property taken and is not related to any issue in this case; is evidence related to the management, to the operation of the business, to the loss of profits, good-will and customs.

Question read.

The Court: Objection sustained. It is not the proper measure of damages. May I suggest, to save time—we are getting pretty near to closing time—why not take the [fol. 329] petition of condemnation and inquire about what it shows was taken and follow the language of the petition, and you will not go wrong.

Mr. Hotz: I did that yesterday with Al.

The Court: Do it again today. You might have better luck than you did yesterday.

Q. Mr. Jacobberger, to begin with, understand in this question, I do not want you to involve the loss of business or the trade routes or anything of that sort which the court has ruled out. We will start out with that hypothesis. I think we know what we are talking about now. "The right to use and occupy the property known as the Kimball Laundry, owned and operated by the Kimball Laundry Company, a corporation, located at 1504 Jones Street, Omaha, Nebraska, consisting of the real estate known as the East 22 Feet of Lot 7, and all of Lot 8, Block 171, Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property

located thereon and therein, and used in connection with [fol. 330] said laundry, excepting only the delivery equipment."

Mr. Hotz: In asking this question to this witness, I am doing it in the light of the rulings of the court that have heretofore been made, that has been excluded, and I think I have explained to the witness so that he won't be complicated with that.

The Court: What is the occasion for this explanation?

Mr. Hotz: I don't want the witness to be misunderstood, as Mr. Murphy is, that I am trying to include something that is more than the land, building, machinery and equipment.

The Court: Why get it so complicated? We are trying to find out what his opinion is of the use of the property that was taken, as described in the petition. What further explanation is necessary? You may answer the question, if you understand it.

The Witness: I am not sure. You want the entire value of the property?

The Court: Yes, value for the use of the property for these three years, seven months and eight days, on the 22nd day of November, 1942. Its value as of that date. [fol. 331] A. In my judgment that would be about $600,000.00.

Cross-Examination of Harry A. Jacobberger by Mr. Murphy:

Q. In that $600,000.00, do you include the value of the going business of the Kimball Laundry Company?

A. No, sir.

Q. Do you think the government should pay you $600,000.00 just solely for the use for three and six-tenths years of the land, building, power plant and machinery? Is that correct? A. I said that was the value of it.

Q. Oh, I understood the question was the use of it.

The Court: The value of the use, was the question.

A. Value for the use—if you asked me what I think it was worth to a tenant who wanted to lease it to some-

body, the government, or anybody else, I can give you that answer.

Q. I thought that was what the question was. Maybe I am confused here.

The Court: The witness must have misunderstood us. We are talking about, now, the value of the property, value of the fee as an allowance that may be taken into consideration, but we are now getting to the proposition [fol. 332] of the damage. How much should the verdict of the jury be to constitute just compensation to the Kimball Laundry for the use of its property which it took and used and damaged, as shown by the evidence. In other words, how much is it going to take to put you back whole as to the physical property out there, the machinery, and cover the loss of the use of the property for the three and six-tenths years; that is what we are trying to get at.

A. I would have to refer to some figures I made up here.

The Court: You may do so.

A. I estimate value of the plant in itself around $600,000.00.

The Court: That is the fee title? A. Yes.

The Court: On the date of taking?

A. Yes. Now, at the present time, we have an estimate of $220,799.09 for the restoration of parts that were entirely destroyed or had excessive wear, both as far as the plant and machines are concerned, and the building, and the building equipment.

Mr. Murphy: Will you read the figures a little more slowly?

[fol. 333] A. Total is $220,799.09. And I figure the use of the plant per year was worth $100,000.00 to anybody that wanted to operate it, to the government or any other individual, $100,000.00 per annum.

Mr. Hotz: Q. That is an addition to the specific damage done? A. Yes.

Mr. Hotz: Q. In other words, it would be two hundred twenty plus, round figures, plus one hundred thousand

dollars per year for three years and seven months and eight days? A. For each year.

The Court: That would be about $360,000.00 for the term, if it is six-tenths of a year. One-tenth of $100,000.00 would be $10,000.00, and six-tenths would be $60,000.00. Let's get the exact figures.

The Witness: That would figure $8,330.00 a month, thirty-six months, plus seven months.

Mr. Hotz: Q. You mean that is based on $100,000.00 per year? A. Yes.

Mr. Hotz: Calling your attention to this fact, that in some of the estimates of the damage to the structure, that is, the building, machinery and equipment, that it [fol. 334] was higher than that that was given by your brother Al, would that, or would that not reduce the $350,000.00, or $100,000.00 per year fair value for the use? Do you understand what I mean? A. I am afraid not.

Mr. Hotz: Q. What I am saying is this: You have two items. $100,000.00 a year for the use. Do you understand that? A. Yes.

Mr. Hotz: Q. That is over and above the amount of damage to the building and machinery and equipment. Do you understand that? A. Yes, I do.

Mr. Hotz: Q. I am calling your attention to the fact that Al estimated on the damage to the building, machinery and equipment, an amount somewhat less than yours. What I am asking you is whether or not, and calling your attention to it, you wish to change anything in connection with this $100,000.00, more or less, on account of that? A. No, I do not.

The Court: Before we adjourn for the day, will you put in one figure or one set of figures what you ask the jury to return to you as the damage which you have sus- [fol. 335] tained to this property? Can you not add it all up and put it in round dollars, how many thousands or hundreds of thousands of dollars you ask?

The Witness: About $580,000.00.

The Court: That covers all these items you have been talking about?

The Witness: Restoration of wornout equipment that was lost or destroyed.

The Court: Repair to the building?

The Witness: Repair to the building and everything and pay us for the use of the building and equipment.

The Court: And equipment for the time? A. Yes.

The Court: We will take an adjournment until ten o'clock tomorrow morning.

Mr. Murphy: I want to keep the record straight. Mr. Hotz turned the witness to me for cross-examination and he got in this examination. I don't want it understood I am finished with my cross-examination.

The Court: The record will show whatever it is.

(An adjournment taken until March 1946, at which time court convened)

[fol. 336] The Court: Proceed, Mr. Murphy, with your cross-examination of Mr. Harry A. Jacobberger.

Cross-Examination of Harry A. Jacobberger by Mr. Murphy (Contd.)

Q. As I understand your testimony, this laundry has been pretty much your hobby for many years, is that correct? A. Correct.

Q. In arriving at your rental or use value, I presume, you have taken that in account and have that in your mind, do you not? A. No.

Q. You don't think you do? A. No.

Q. You think, do you, Mr. Jacobberger, that, assuming you had a man who was willing to lease your physical plant and was willing to pay all repairs and upkeep and lease it for two or three or four years and turn it back to you with everything repaired and renovated, that you would find any such individual anywhere in the world who would pay you $100,000.00 a year, over and above those expenses, for the use of that property?

A. I think I could.

Q. What elements do you include in that $100,000.00 a year?

[fol. 337] A. Nothing but the rental of a business that he is leasing.

Q. You heard the testimony of your brother, Mr. A. L. Jacobberger, and his figures are somewhat identical with yours as to totals. Did you arrive at that $100,000.00 a year by figuring, for instance, your depreciation.

A. No, sir.

Q. How did you arrive at that $100,000.00 a year? You didn't just reach up in the air and grab that figure, did you?

A. No, I arrived at that figure, the value that plant had to us as a going concern.

Q. That is exactly what I am getting at. Your $100,000.00, a yearly rental use value, is based on the value of that plant to you as a going concern?

A. That was what it was in 1942, yes, sir.

Q. You spoke yesterday, I believe, about having had an elevator, stairway and fire escapes. They are all still there, aren't they? A. Yes, sir.

Q. Your plant is what is called a multi-floor laundry plant, is it not? A. Yes.

[fol. 338] Q. Suppose while you are operating that plant, or in the future when you are operating it, I should send down the family laundry, including shirts, children's clothing, underwear, bedding, blankets, would all of that laundry be taken care of, worked on on one floor, or would it be distributed among various floors?

A. Among various floors.

Q. So, my little bundle of laundry would have to be segregated and carried to different floors and worked on on different floors, is that correct?

A. The man who would pick up your laundry, would take the blankets and make a bundle out of that, and your shirts and wearing apparel would be in another bundle.

Q. Somewhere along the line my laundry would have to be segregated and worked on on different floors?

A. Before it went on the floor, yes.

Q. In your building you have but one elevator in that five stories? A. Yes.

Q. You testified something yesterday about water. You use hot water, of course, in your laundry, don't you?

A. Yes, sir.

[fol. 339] Q. On how many floors?

A. Hot water is used on three floors, really four floors.

Q. Which four floors?

A. On the second floor to wash, and on the third floor and on the fourth floor. We use hot water for some purposes on the fifth floor; even use hot water on the ground floor.

Q. Since what year had you been using hot water on all four of those floors?

A. We used it on all four up to 1935, and after 1935, used it on five floors.

Q. How many gallons of hot water a day would you say you use in that plant?

A. It varies with the volume of business we happen to be doing that day. Sometimes, maybe we would use 150,000 gallons; some days a little less or more.

Q. Sometimes you might get close to 200,000 gallons? A. That would be the total amount of water used, hot and cold.

Q. So, over a period of eighteen years, before the army or government ever took over, you were using 100,000 gallons of hot water through that plant, through the machines, through the gutters, six days a week, every day in the year, weren't you?

A. We operate six days a week, about five and one-half days.

Q. You were using those volumes of hot water? A. Yes.

Q. And steam off that water through your plant down there? A. Yes.

Q. Except for the fifth floor, that was true for eighteen years, wasn't it? A. Yes, sir.

Q. Some of that machinery you had down there in the laundry when the army took over had been there and used by you for eighteen years, hadn't it?

A. Yes, some even longer than that.

Q. Some of it you used even before you built this building and moved in there? A. A few pieces, yes.

Q. You spoke of boilers you have down there, as being unique boilers. They are so unique they are not even made any more, isn't that a fact? A. No.

Q. Who made that boiler?

A. Drake, Williams & Mount.

Q. Do you know Drake, Williams & Mount are not making that boiler today?

[fol. 341] A. I talked to Mr. Williams about it before and he told me he might find the proper forms and templets and he might be able to do it. He said he couldn't get the steel at this time, but somebody could make it.

Q. Somebody else could make a special job for your plant? A. Yes.

Q. But they are not made and sold on the market here today? A. No, not here.

Q. You had a couple of bids here yesterday, one, I think, on a hot water tank, is that right?

A. No, we had a bid for painting.

Q. No.

A. Yes, we did have a bid for a hot water heater and reclaimer.

Q. Those are two different things? A. Yes, sir.

Q. Where in your building is the hot water heater located?

A. On the top floor in a separate housing on the fifth floor.

Q. On the fifth floor? A. Yes.

[fol. 342] Q. When was that installed there?

A. I think that one was installed about 1927. We had another one up there before that time that didn't prove out, so we had to get rid of it.

Q. I thought your fifth floor wasn't built until 1935?

A. But we had our hot water heater up there, just the same, and our storage tank house.

Q. That was up there about 1927?

A. That heater went in about 1927, yes, sir.

Q. And was used by you from then until the army took over in 1942? A. Yes, sir.

Q. Before the fifth floor, or story, was constructed in 1935, was that in a sort of a room out on the roof?

A. Yes, sir.

Q. It wasn't exposed to the elements, I don't suppose, or was it?

A. It was on a separate building on the roof, up to the level of what is now the fifth story.

Q. And that has been up there since 1927? A. Yes.

Q. You think the government ought to reimburse you for that?

[fol. 343] A. We considered it as good as brand new when we left in 1942. It was a copper-lined heater and with proper use it would last indefinitely, nothing could go wrong with it; there couldn't be any corrosion if properly used.

Q. What went wrong with it?

A. I think they drained it down a couple of times—

A. I am not asking you that—

A. I understand that the shell, the inside copper fitting has collapsed, broken up, letting the water get through the steel pipes of that heater, and of course, that would rust it out inside of six or eight months.

Q. The copper plates finally wore out? A. No.

Q. They broke down?

A. They broke down because they let water out of the heater and created a vacuum without opening up a relief well.

Q. Did you ever see that? A. I was informed—

Q. I am not asking you that. I want to know of your own personal knowledge, and not what somebody else told you. A. I didn't see it myself.

[fol. 344] Q. You don't know of your own personal knowledge what happened to that heater?

A. Only what I have been told.

Q. You have been up there to examine it yourself?

A. No, sir.

Q. You don't really have any personal knowledge about that heater or its condition, at all?

A. People who worked for me—

Q. I am not asking you about that. I am asking you about your own personal knowledge or experience of that thing;

A. I am not in the habit of crawling into things and finding out. I take the word of people I hire to do things for me.

Q. The heat reclaimer, where is that located?

A. In the boiler room in a separate concrete vault.

Q. When was that installed? A. In 1925 or 1926.

Q. And has been there ever since? A. Yes, sir.

Q. And was used by the Kimball Laundry Company in the operation of this plant up until November, 1942?

A. Yes, sir.

Q. What is the heat reclaimer? Tell us a little about what it does.

[fol.345] A. The heat reclaimer was composed of some cast iron headers, to which were attached about 2800 feet of one-inch copper tubing. The idea was that the cold water would pass in at one end of this header and go through the copper tubing and come out at the top and rise up to the heater on the top of the roof. The wash water that came from the gutters on these various floors of the wash rooms went down into this—

The Court: In which "this"?

A. Heater, was heated, and the heater would absorb the heat from the water before it overflowed into the sewer. That absorbed about 45 degrees of heat from the waste water.

Q. Do I understand—I am not a mechanic or laundry man—do I understand this hot water you used on the second and third floors, after it had served its purpose and the laundry had been washed in it, or whatever you do, and it is drained into these gutters, and then it flows back down to the first floor, or wherever this heat reclaimer is, then does that water go through this heat reclaimer?

A. No, it goes around the coils of the header sets into this concrete tank.

[fol. 346] Q. Does that hot water come in contact—

A. It comes in contact with that copper tubing.

Q. That is water that has been used, and I suppose some substance put in it to get dirt out of the clothing?

A. Soap and soda.

The Court: I am wondering if you have the matter clear. It is hot waste water that is used to a degree to heat the cold water that is coming in and save the necessary fuel. It is water that has no value except its heat.

Q. And it does contact with the coils of this heat reclaimer? A. Yes, sir.

Q. And that process continued for some sixteen or eighteen years while you operated this plant? A. Yes, sir.

Q. And the heat reclaimer today, in your opinion, is no longer of any use? A. That is correct.

Q. And you want the government to buy a brand new one and install it there for you?

A. I will answer it the same way I did with the heater. They wrecked it. Nothing can go wrong with the copper coils if they are properly taken care of.

[fol. 347] Q. Are you asking the jury to include in their verdict an amount, the cost of installing a completely brand new heater in place of this one you used for sixteen or eighteen years? A. Yes, sir.

Q. And in your opinion, the total value of this physical plant the army took over the use of for three and six-tenths years was approximately $600,000.00 when they took it over? A. Yes, sir.

Q. Notwithstanding the fact that the building and machinery and power plant and land, some of it in damaged condition, that all is to be returned to you, and you still think the government should pay you within $20,000.00 of the total value of the entire plant? Did I understand that to be your claim, $580,000.00 and some odd thousand dollars?

A. Pardon me if I refer to my notes. We are asking $100,000.00 a year rental.

Q. I am asking you about the total figure you used yesterday. If I misquoted you, please correct me.

A. And in addition, we are asking for damage to the machinery or value of it today.

Q. I am asking you now if you did not testify yester-
[fol. 348] day your claim is $580,000.00? A. Yes, sir.

Q. That is what you want the government to pay you?

A. Yes, sir.

Redirect Examination by Mr. Hotz:

Q. In the cross-examination by Mr. Murphy, he specifically referred to two items and emphasized the fact in his question that they had been used for eighteen years in the operation of the Kimball Laundry Company, and one of those was a piece of equipment that was on the roof. Will you tell us the name of that again? The one with copper coils? A. Hot water heater.

Q. That was a hot water heater. How does a hot water heater come to be on the top of the roof?

A. Well, it was near to our storage tank. We felt it was the best place to put it, from my experience I have had in operating laundries.

Q. It was housed in a special house? A. Yes, sir.

Q. Was one of the letters you had here yesterday that was introduced in evidence, does it have to do with the restoration or replacement of that particular piece of
[fol. 349] equipment, known as the hot water heater, concerning which Mr. Murphy cross-examined you?

A. An estimate as to the cost for delivery at Omaha.

Q. Was that in one of these letters? A. Yes.

Q. In which letter was it, what company?

A. I don't remember the number of the exhibit.

Q. From what company?

A. Kelley-Patterson Company.

Q. Which one of these two letters was that, giving it by exhibit number? A. 43.

Mr. Hotz: This letter has not been read to the jury. May I read it now?

The Court: You may.

(Mr. Hotz read Exhibit 43 to the jury, said exhibit being found in Volume III, at Page 1086.)

Q. What does Exhibit No. 44 refer to?

A. Covering the same thing, but it gives you the price. I might add, I don't think it states in that letter it was to be exactly the same capacity as we formerly had.

Q. Did you ask for any changes or additions or betterments?

[fol. 350] A. No.

Q. You are getting as good a machine?

A. Not in the heater.

Q. What about the reclaimer?

A. The reclaimer will be the same. They made them a little wider, as it tells us in that letter. They think it is a benefit. I don't think it is.

(Mr. Hotz read Exhibit 44 to the jury, said exhibit being found in Volume III, at Page 1087.)

Q. Will there be extra expense to the Kimball Laundry Company to get those two items in place?

A. Yes, they have to be handled off the cars, and the old ones have to be taken out and these have to be replaced after the old ones are disconnected. I might add, when you mentioned "Everdur," it isn't as efficient or lasting as copper. They are not able to get copper, so they call it something they call Everdur. It is supposed to be a rust-resisting metal. Copper never rusts and copper does not wear out by water passing inside or around it, but in the other metal, it will wear or rust out in time. Neither one of the machines are as good as what was in there.

Q. You would have preferred to have the equipment [fol. 351] exactly as it was on November 22, 1942, would you? A. Yes, sir.

Q. Mr. Murphy talked to you about some of the equipment being in the laundry when you started? A. Yes, sir.

Q. You might state to the jury, generally, what pieces were there and what their condition was in 1942?

A. We had a couple of flat work ironers that were moved in that plant when we built it, and I believe that

is the only thing that was left in the plant. The flat work ironers, properly kept up, will last you 100 years, or more, though they have been fully depreciated on our books, due to laundry depreciation we have taken each year for income tax, but they are still operating just as good as the day they went in.

Q. Mr. Murphy talked with you about the elevator, and emphasized the fact that there was only one elevator in this building, and that it was a multi-floor laundry. What is there in that building that has been designed to take the place of elevators?

A. A double conveyor chute that delivers the stuff from the various floors down to the loading room.

[fol. 352] Q. Is there any difference in the efficiency of operation of what counsel termed a multi-floor laundry?

A. That has been my judgment, yes, sir.

Q. Tell us what is your judgment?

A. There is more efficient operation in a multi-floor plant, the way we have built it.

Q. You mean one floor on top of another, rather than spread out on one floor over a large place?

A. You can departmentalize the place and segregate it so you can do one kind of work on one floor and another on another floor. In other words, we had three complete laundries in that building.

The Court: You might tell us the capacity, how many tons or pounds will it carry? What is the capacity?

A. I couldn't tell you in pounds, but the volume of work we did in 1942 could easily be added thirty or more per cent to it without any increase in machinery or labor.

The Court: What is the size of your cage?

Mr. Hotz: He is talking about the elevator.

A. It was a four-ton elevator, four thousand pound elevator.

Q. In connection with the segregating of laundry, Mr. [fol. 353] Murphy brought out the segregation, you had to take part of it and segregate it and put it on different floors. Was that necessary in connection with the handling of the laundry for soldiers, the same as it would be for civilians, it would have to also be separated? A. No.

Q. How is that handled?

A. When they brought it in—I was over there and I saw them load trucks containing individual sacks for the enlisted men. That contained their personal laundry, such as shirts and suits and socks and handkerchiefs and underwear, and then they brought in lots of flat work for hospital work and things that they use for making up their beds, sheets and coverings and sheetings of different kinds. That came in as a separate proposition, and of course, it was easily handled, put on the elevator and sent to the floor to be washed (on).

Q. It was separated before it came? A. Yes, sir.

Q. And the laundry was especially adapted for that very thing—happened to be? A. Happened to be so.

[fol. 354] Q. In connection with your boilers, Mr. Murphy, in his cross-examination, made reference to the fact that the boilers are no longer made, similar boilers are no longer made. Isn't it a fact those were specially built boilers you had made up under your own supervision and direction for that plant? A. Yes.

Q. They were custom built? A. Custom built.

Q. Explain shortly what your plan was when they were put in there under your supervision and direction, as custom built, as compared with the ordinary boilers you would buy on the market, of a standard type?

A. I happen to know the inventor of it and he sold me a bill of goods that I believed in, and he had made several of those boilers, one was in Fremont and one was in Des Moines, and I investigated and found out what they were. They had the first one that was made in Lincoln running about forty years. It was taken out because they were going to get a larger plant, not because the boiler wasn't good, and I found out they were one of the best steamers for a small type boiler you could buy. In fact, [fol. 355] I proved that statement. I surprised the steam engineers in the city of Omaha when they found the evaporation we got out of those boilers.

Q. Did they efficiently continue up until November, 1942? A. Yes, sir.

Q. So far as the Kimball Laundry was concerned, did you consider, Mr. Jacobberger, that those boilers were just as good and efficient for your purpose as new ones?

A. Yes, sir.

Q. Would you like to replace them exactly as they were? A. I certainly would.

Q. Have you had any success yet in being able to do so? A. None whatever, yet.

Q. You have to take something that is standard on the market? A. Possibly.

Recross-Examination of Harry A. Jacobberger by Mr. Murphy:

Q. The fact still remains these were a standard boiler that were manufactured and sold and installed and they are no longer manufactured, sold and installed by the people who manufactured and sold them?

[fol. 356] A. Drake, Williams & Mount are not making them now.

Mr. Murphy: That is all.

Redirect Examination of Harry A. Jacobberger by Mr. Hotz:

Q. You are trying to find somebody else who is?

A. Yes, sir.

Mr. Hotz: If Your Honor please, there are two questions I want to put to this witness I would like to have in the form of direct examination. I omitted them.

The Court: Very well, it will be permitted.

Direct Examination of Harry A. Jacobberger by Mr. Hotz:

Q. When this laundry was taken over by the government in 1942, did the Kimball Laundry Company have available to it in the laundry another space where it might have moved?

Mr. Murphy: Objected to as incompetent and immaterial.

The Court: Sustained.

Q. Did the Kimball Laundry Company remain in business after November 22, 1942?

Mr. Murphy: That is also objected to as incompetent and immaterial.

The Court: That will be sustained.

[fol. 357] Q. Was the Kimball Laundry able to remain in business after November 22, 1942?

Mr. Murphy: Objected to as incompetent and immaterial, and further, it is an improper question.

The Court: Sustained.

Q. Was the Kimball Laundry Company business as a going concern destroyed by the taking on November 22, 1942?

Mr. Murphy: Objected to as incompetent and irrelevant and not within the issues in this case and having been already ruled on by the court two or three times.

The Court: That will be sustained and you will not continue that further. You made your record now sufficient, Mr. Hotz.

Mr. Hotz: I want to read in the offer.

The Court: That isn't necessary.

Mr. Hotz: I have always thought so. We offer to prove by this witness, if he were allowed to answer the questions propounded to him, that the Kimball Laundry Company, at the time of the taking was completely driven out of business by the taking.

Mr. Murphy: Same objection to the offer as to the question, and for the further reason the offer is broader than the question.

[fol. 358] The Court: Sustained. The offer will be denied.

Mr. Hotz: This offer goes to all four of the last questions propounded to the witness and upon which the court ruled that the witness might not answer.

Mr. Murphy: Same objection to the amended offer.

The Court: Sustained. Offer denied.

Mr. Hotz: Is it customary to have the exceptions noted of counsel? Are they put in the record?

The Court: Which counsel?

Mr. Hotz: Ours.

The Court: Your exception?

Mr. Hotz: Yes.

The Court: They are noted as a matter of course. Under the ruling on everything adverse, you get an exception to, as a matter of course.

Redirect Examination of Harry A. Jacobberger by Mr. Hotz:

Q. You made some mention of the shipment of certain machinery in the plant, particularly the washing machines, large washing machines, to put them in the same state of repair that they were in November 22, 1942, to ship them to the factory for the purpose of having the [fol. 359]] work done. Where is the factory you had in mind?

Mr. Murphy: Objected to as incompetent and not proper redirect.

The Court: Sustained.

Mr. Hotz: Is it sustained upon the ground it is not proper redirect?

The Court: It is wholly immaterial.

Mr. Hotz: Not because it is not direct examination?

The Court: No, of course not. I am not holding you down strictly to the rules. If I did we would have a lot of trouble.

Q. Do you know anything about the length of time it would take to have these washing machines repaired in the manner in which you have stated?

A. The best information I have, it might be—

Mr. Murphy: Just a minute. Object to the witness giving hearsay testimony in answer to the question.

The Court: That will be sustained. If you have an opinion of your own, you may give it to us.

Q. Yes, you had experience in the operation of the laundry before and that would help you in forming a judgment of your own, and you are permitted to give that. [fol. 360] A. I have to give consideration to the condition of the factory where they are unable to get the material—

Mr. Murphy: If the court please, I object to the explanation of the answer before any answer is given.

The Court: That will be sustained. From all the information, from your experience as a laundry man, do you have an opinion as to how long it will take, under the conditions as you know them to be, to repair this machinery that is referred to? Do you have an opinion?

A. Yes.

The Court: What is that opinion?

A. About six months. (Witness excused.)

Mr. Murphy: At this time petitioner moves the court to strike from the record and to instruct the jury to entirely disregard the testimony of this witness Harry A. Jacobberger as to the rental or use value of the property in question at $100,000.00 a year, a total of $360,000.00, for the reason that said sum and figure, according to the testimony of the witness himself, is based upon and is his opinion of the value to the Kimball Laundry Com- [fol. 361] pany of this property as a going concern, and is therefore not a proper measure of damages and not within the issues of this case.

The Court: Objection overruled, because the testimony, part of it is competent and other matters are incompetent. The court expects, at a later time, to instruct the jury to disregard all testimony pertaining to consequential damages, anything personal to the owner or the owners, and confine their verdict to the property and matters incident thereto. I have so announced at different times. The rule I am administering is pretty well understood. I hope you will confine it within that scope, but we have not been able to, and I will have to deal with it when I come to instruct the jury finally in this case. I announce this rule in advance at this time so that counsel may be advised to spend no time on any of these matters that I have referred to as not being elements of damages recoverable in this action, so that you will not be in any way prejudiced by it or taken in any way by surprise.

Mr. Hotz: I would like to put Mr. Harry Jacobberger on the stand for a moment.

The Court: Have him come forward.

[fol. 362] *Redirect Examination of Harry A. Jacobberger by Mr. Hotz:*

Q. I will ask you if in making the estimate of the amount of money that you believed the Kimball Laundry Company should have for the temporary use of this property, whether you took into consideration the customers or trade routes or things of that sort, as an element in arriving at that conclusion, such as the destruction of business, or anything of that sort—good will?

Mr. Murphy: Objected to as improper redirect examination; having been asked and answered both on direct and cross-examination.

The Court: That will be sustained. The witness has testified specifically that he considered the use of the property as a going concern, which includes all of these elements.

Q. Mr. Jacobberger, you have heard the remarks of the court. Is that your view of it or not?

Mr. Murphy: Same objection to the question.

The Court: Sustained. It is an improper question. If he wishes to change his testimony in any way, make an application; maybe it will be granted.

Q. You have heard the colloquy and statement of the court. I will put this question to you, and if you wish to [fol. 363] change your testimony, you are privileged to do so. What did you take into consideration when you made the statement in response to the counsel's inquiry or question upon which to base the $100,000.00 per year for the use and the damage, in addition to $220,000.00, to make the $580,000.00 that counsel was talking about when he was cross-examining you? If you want to change your testimony in that regard, or offer any explanation, you may do so.

Mr. Murphy: Objected to for the same reason as the original question. It is an exact repetition of the original

question, with two or three others involved in it, and indefinite and uncertain.

The Court: That will be sustained and the court will try to help him out. What did you mean when you said in answer to Mr. Murphy's question that you valued the use of the property as a going concern? What are the elements you had in mind?

A. I had in mind that if someone came to me and wanted to lease the property for a matter of two or three years, that is what it would cost. That is the consideration.

The Court: That is, you mean to take over your entire laundry business?

[fol. 364] A. Take over the physical plant and start to operate where we left off.

Q. Did it mean taking into consideration the customers routes and the trade?

Mr. Murphy: Same objection.

The Court: Sustained.

Q. Did you mean physical assets, alone?

Mr. Murphy: Objected to for the same reason and repetition and improper redirect.

The Court: That will be sustained.

Q. I will ask you once more whether or not in your statement to Mr. Murphy, whether you meant the rental of the physical assets for the period of three and one-half years?

The Court: That will not be permitted. It is for the jury to determine what he meant by his testimony. He has repeated it several times. If he wishes to make any change in any of these statements he has made, or if he wishes to withdraw any statement he has made he can do so, but you cannot proceed in this way longer.

Q. Do you wish to withdraw or change your testimony in that respect?

A. I didn't know there was going to be any misunderstanding about my statement.

[fol. 365] Mr. Murphy: I move to strike that and ask the witness answer that simple question "yes" or "no."

The Court: Sustained.

Q. If you wish to change and withdraw your statement you made as a going business, that is the thing we are getting at. You made the statement, "As a going concern."

The Court: In order to be fair to the witness—we seem to have got him confused. Maybe I have. To be fair to the witness, you may state again, Mr. Jacobberger, what are the elements that you considered as making up your opinion, or arriving at your opinion that the fair and reasonable market value of the use of the building, the machinery and the ground, on the 22nd day of November, 1942, for a term of three years, seven months and eight days was the sum of $100,000.00 per year. Tell us again so there will be no mistake about it.

A. That is exactly what I meant with reference to the building, ground, equipment and all of the things we had to go with the business over there, to be worth the sum of $100,000.00.

The Court: What do you mean by "the business"?

A. There are a lot of things we haven't enumerated. [fol. 366] We have store rooms, cold storage, which is part of the business.

The Court: We will proceed with the matter no farther.

Mr. Hotz: That is all.

Mr. Murphy: That is all. (Witness excused)

[fol. 367] Mr. Fred Jacobberger, produced as a witness of the *Kimball Laundry Company*, being first duly sworn, testified as follows:

Direct Examination by Mr. Hotz:

Q. State your name. A. Harry Fred Jacobberger.

Q. Where do you reside? A. 1501 South 84th Street.

Q. How old are you? A. Thirty-three.

Q. What is your business at the present time?

A. At the present time I am a major in the Quartermaster Corps on terminal leave, United States army.

Q. When did you enter the army?

A. January 28, 1942.

Q. Prior to your entrance into the army, were you identified with the Kimball Laundry Company? A. I was.

Q. In what capacity? A. As vice-president.

Q. Did you have any work to do at the plant? A. I did.

Q. And did so? A. I did.

[fol. 368] For how long a period of time? A. Ten years.

Q. What is your previous education?

The Court: You mean in the laundry business?

Mr. Hotz: No, his education.

Q. What school training have you had?

A. I attended Creighton University for two years.

Q. And graduated from high school, I suppose?

A. And graduated from high school, yes, sir.

Q. And then you went in with your father and uncle in the laundry business down here at the Kimball Laundry Company? A. Yes.

Q. When was that? A. 1932.

Q. What did you work at in the laundry, what particular branch? A. I had charge of sales promotion.

Q. You continued working in the laundry there for how long a period? A. Ten years.

Q. Up until the time you went into the army?

A. Yes, sir.

Q. In addition to your experience in the Kimball Laundry Company here, since you have been in the army, have [fol. 369] you had any experience with laundries?

A. I have.

Q. In what capacity?

A. I was quartermaster laundry officer in charge of the quartermaster laundry at Jefferson Barracks, Missouri, for two and one-half years, and I was quartermaster laundry officer in charge of the quartermaster laundry and dry cleaning plant at Camp Carson, Colorado for eighteen months.

Q. In the last location, how many soldiers were there stationed and serviced by that laundry?

A. Well, the number varied, but the peak was 65,000.

Q. In reference to the United States Army, what is the City of Omaha in reference to the Seventh Service Command?

A. Omaha is the headquarters of the Seventh Service Command.

Q. The Seventh Service Command takes in how many states, about? A. Nine states.

Q. Do you know anything about the capacity of laundries and how they are rated?

A. You mean government laundries?

Q. Yes.

[fol. 370] A. I do.

Q. Please tell the jury how we get at that capacity.

A. Government laundries are rated and typed by number, the largest being a Type 5 Quartermaster Laundry. That is constructed and equipped to process 20,000 individual bundles per week.

Q. There are other classes?

A. There are. There is a Type 4, a Type 3, but I can't say exactly what the ratings of those type of laundries are.

Q. What was the one at Camp Carson.

A. It was a Type 5.

Q. Are you familiar with the machinery and equipment and the capacity of the Kimball Laundry Company as it was in November, 1942? A. I am.

Q. How are those classifications you have just given gauged? How are they made in connection with the laundry and equipment that has the capacity of handling the total number of bundles you spoke about?

A. Gauged by the size of the plant, the building, the output of the power plant, and the capacity of laundry and dry cleaning machinery in pieces and pounds and bundles.

[fol. 371] Q. What would you say was the rating of the Kimball Laundry Company in November, 1942? What classification was it?

A. The Kimball Laundry Company in 1942 was of a size and contained equipment and machinery comparable to a Type 5 quartermaster laundry.

Q. Was the Kimball Laundry Company equipped with laundry machinery and equipment and dry cleaning equipmet to handle a 20,000 bundle limit? A. It was.

Q. Per week? A. Yes, sir.

Q. In the laundry out there at Jefferson Barracks, was that laundry built for the camp, for the soldiers, or was it one that was taken over?

A. The Jefferson Barracks laundry was built as an integral part of the facilities of Jefferson Barracks, Missouri.

Q. Were you there at the time it was being built?

A. Not the original plant, no, sir.

Q. Was there an extension built? A. There was.

Q. Were you there at the time that was going on?

A. I was. That was in 1942.

Q. Just describe that generally, how that plant was [fol. 372] constructed?

A. The plant was a one-floor construction of brick with a wooden roof, and in our addition that we built and equipped in 1942, we just doubled the size of the whole plant.

Q. Was it under your supervision to requisition, buy the laundry machinery and things of that sort?

A. It was up to me to make the recommendations as to what we would need and to draw up plans of the area, of the equipment, in order to process the work.

Q. How many soldiers were there to be serviced by that laundry? A. Generally 40,000.

Q. Was that a Class 5 or 4 or 3?

A. The Jefferson Barracks laundry originally was built during the first war and has been added to several times since then and no one in the quartermaster corps has ever been able to definitely type it. The types of these laundries pertain to these plants built by the quartermaster corps right from the ground up.

Q. You wouldn't be able to classify the one at Jefferson Barracks?

A. I would say the Jefferson Barracks laundry had [fol. 373] a capacity comparable to a Type 3.

Q. You say there were 40,000 men at Jefferson Barracks? A. Yes, sir.

Q. Do you have a cousin that was in the laundry, a Jacobberger, who was also identified with the Kimball Laundry Company? A. I did.

Q. Who was he? A. Bernard.

Q. Where is Bernard at the present time?

A. Bernard is at Camp Beal, California.

A. In what capacity?

A. Quartermaster laundry officer.

Q. What is his rank?

A. He was Captain, last I heard from him.

Q. Did both of you boys get your training under Harry and Al in the Kimball Laundry Company? A. We did.

Q. I think you said you were eighteen months at Camp Carson, Colorado? A. That is right.

Q. The peak number of soldiers there was 65,000?

A. The total strength of the organization, as we served, reached a peak of 65,000.

Q. Major, I would like to have you state the relation- [fol. 374] ship between a laundry and the man. I am putting it from the standpoint of sanitation and its immediate necessity, and if there is any relationship to epidemics and things of that sort? I am leading up to capacity and necessity for immediate use of laundries.

A. The quartermaster laundries installed at these various post camps and stations are there primarily under army regulations to serve enlisted patrons, to launder the individual clothing of the enlisted men in order that he may keep himself in a sanitary condition. Under army regulations, first priority must be given to enlisted men's work. If the capacity of a plant has been reached and there is still work to be done, the quartermaster laundry officer, under army regulations, is required to order out, or order removed from the laundry, considerable bulk work or officers' work to make room for the enlisted men's individual bundles. They come first, always.

Q. They come first? A. Yes, sir.

Q. That has relation to the sanitation feature?

A. That is the general idea, yes, sir.

Q. What is the individual enlisted man required, under [fol. 375] army regulations, to do? How much laundry is he supposed to send in and what must he do?

Mr. Murphy: Just a minute. I confess I don't get the connection.

The Court: It is preliminary, I take it, to something he is leading up to, as I understand it. Maybe he will get the information shortly.

A. Enlisted men in the army are required, under the regulations, to keep their person and personal equipment clean, sanitary and presentable. They are not required to use a quartermaster laundry if they do not desire.

Q. They could go outside?

A. They could, or they can wash their clothing themselves, if they wish.

Q. What are they required to have laundered each week? What is in the enlisted man's bundle, is what I am getting at?

A. His individual clothing. In the wintertime it will consist of wool underwear, socks, handkerchiefs, towel, wash cloth, and a few cotton shirts. You don't find many of those in the wintertime. His fatigues. His fatigue clothing he wears during the day, mostly, and in the summertime you have that, of course, in addition his summer [fol. 376] cotton khaki uniforms that are laundered rather than dry cleaned.

Q. Is the service given to him at the laundry free, or does he pay for it?

Mr. Murphy: Objected to as irrelevant and immaterial.

The Court: I don't see where that can possibly be material. What is the purpose of this?

Mr. Hotz: I want to show the necessity of keeping the Kimball Laundry Company accessible for these men.

The Court: I think you have shown that. What difference does it make who pays for it so long as it is done?

Q. When did you see the Kimball Laundry Company equipment and go through the plant, since November, 1942? Were you back here to visit and go through?

A. The first time after November, 1942, was the first week in January of 1943. I don't have the exact dates, but since that time I was granted leaves at approximately six-month intervals, and whenever I was home I visited the laundry and the officer in charge was always kind enough to let me go through and look at it.

Q. Major Jacobberger, on the plant out at Camp Car-
[fol. 377] son, what sort of building did they have there?

A. The building at Camp Carson was a one-story cantonment type frame, temporary structure.

Q. What kind of machinery was in it as compared with the Kimball Laundry Company?

A. Well, there were different trade names; different brands of machinery mostly, but it was approximately the same type, with the exception of the washing machine. In the washing machine we had the so-called factory models of washing machines. The cylinders were wood rather than metal.

Q. And the Kimball Laundry Company here had the metal insides? A Monel metal both inside and out.

Q. Which is the better type? A. The monel metal.

Q. Could you compare the two laundries as to the value of the equipment, as you know it, for both laundry machinery and equipment, and as you requisitioned it?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial; calling for a comparison; and entirely outside the issues of this case.

The Court: He is leading up to a matter of appraisal. Did he, in making the appraisal, consider what he knew
[fol. 378] about the machinery out there. It is not necessary to lay a foundation for his opinion. He is a part owner and an officer of the corporation and you do not have to lay the foundation you would otherwise, but if it is general information, it will be helpful.

Mr. Hotz: I am leading up to something I think will be material.

Q. I am asking a question to compare those two laundries as to the inside, the value of machinery and equipment, as you saw it, at Camp Carson, in 1942, and here.

A. The value of the machinery and equipment and building and power equipment at Camp Carson—I might add there were no water softeners—the nature of the water made them unnecessary—

Q. You mean in Colorado?

A. Yes, and they had no heat reclaimer because the quartermaster corps didn't consider them necessary. In my opinion, the value of that plant was $750,000.00.

Q. You mean the Carson plant?

A. The Carson plant, not including the dry cleaning plant.

Q. And that was a wooden, frame structure?

[fol. 379] A. Yes.

Q. And that had a capacity to handle as high as 65,000 soldiers, is that right?

A. It would handle the work ordinarily received from that many.

Q. And had a capacity of 20,000 bundles per week?

A. Rated capacity of 20,000 bundles per week.

Q. I want you to compare that with the Kimball Laundry Company, the Carson plant?

A. The Carson plant was a one-story structure, and the Omaha plant, Kimball Laundry Company, is a multi-story plant. With that difference, the capacity in floor space and equipment and machinery was about the same.

Q. About the same? A. Yes, sir.

Q. I think you stated that it was a wooden structure?

A. Yes, just a wooden, unfinished structure.

Q. I suppose that naturally had cement floors?

A. Concrete floors.

Q. As between the two types, which is the most efficient, the floors on top of each other, or all on one floor?

A. In my opinion the multi-floor plan is more efficient.

[fol. 380] Q. Is it a better arrangement and more efficient? A. Yes, sir.

Q. Did you have a chance to go through the plant since you got back, and have gone down there and looked it over and seen the condition of the machinery and equipment as it exists there now and as you saw it in 1942,

when you left here; as it was in January, 1943, when you returned, and as it was in the early part of 1942 when you left? A. Yes, I was through there last week.

Q. Just tell us generally what you observed, taking the structure first, and the machinery and equipment and the power plant, as you found it, and as you saw it, and tell us what you observed?

A. I didn't have the time to make a detailed study, but the building and equipment and machinery appeared to me to need extensive recondi ing, replacement, and renovation. The building itself was the easiest to notice. Of course, I didn't have time to examine every machine, but the building, to the naked eye, is in a pretty poor condition. Outside of the building, you drive up in front of it and notice a roped-off area on the sidewalks. Upon investigation, you find those ropes are put there in order [fol. 381] that people walking underneath won't get hit on the head by falling pieces of this terra cotta that is falling off of the window trim. Then, on the 15th Street side the sidewalk is in very bad condition. It is in a condition that endangers, in my opinion, the safety of pedestrians walking by. The trim around the metal factory window frames is rusted and chipped. An unusually large amount of window panes are broken or cracked. The floor is in need of resurfacing. There has been what I take to be a temporary resurfacing job done to some of it. On the fifth floor, where the inside of the building is of a tile construction, the tile has been chipped and broken off. The terrazzo flooring has been chipped and worn away from the metal expansion grids in between the squares. The entire building sadly lacks paint. There is a large crack in the stack on the chimney. The washroom floors are badly worn. The gutters under the washing machines are almost in unusable shape; that is, if you mind them leaking at all. The elevator doors, I noticed, were difficult to operate and evidently sprung and needed resetting. There are fire doors on each floor that are badly rusted and they appear to need replacement, [fol. 382] if not extensive remodeling and repair. There

has been some alterations made in the building itself in the office downstairs—they have taken a room that I had in there for route men to come in and report to the office. They have removed the counter that ran around the three sides of the room, for some reason, and have cut a door through the west wall of this room. In order to use the room as I did before, it would be necessary to brick up that space there and remove that door.

Q. What floor is that?

A. On the first floor in the office. On a hurried trip through the building, that is, in general, what I noticed. The equipment it was difficult for me to inspect and judge what needed to be done to it, because there have been so many changes made in the equipment as I knew it when I was there. There has been a great amount of it removed and I noticed in the garage there are a couple of piles of something that—well, it is equipment and I don't know what pieces they are—they are badly rusted; evidently have been improperly stored; but I didn't get to see the plant in operation, and I didn't have the time to watch the machinery in operation to judge whether [fol. 383] it needs adjusting or not. It was very difficult for me. I had been away four years, but there has been so much stuff taken out and government stuff put in that I can't really estimate the amount of work needed on any of the equipment.

Q. What about the power plant? Did you have a chance to look at that?

A. Yes, I did. I looked at the power plant; the softeners are still there and seem to be working all right; the Westinghouse air brake air compressor which we had, which was steam operated, is still there, but not being used. In its place is an electric air compressor of the type you will see sometimes on these floor-sanding jobs, which is hooked up and running. The water reclaimer is pretty badly shot due to improper cleaning of the coils. The small boiler is down, being operated, I understand now, partially, but wouldn't be if it were left up to me.

Q. The laundry at Camp Carson was a government-owned laundry, was it not?

A. Yes, that was a government laundry.

Q. And this, under army operation, was a leased proposition?

A. Yes. I might add that on the equipment, the one [fol. 384] thing I did notice in the hurried trip I made through, that on the metal parts of a lot of laundry machinery, they are required to be painted from time to time to prevent rust and this has not been done and the exterior metal parts on a great amount of this equipment, particularly on the extractor shells, are in a badly rusted state and in great need of repair and renovation.

Q. As compared with the Camp Carson laundry you had charge of, what generally would you say was the difference between the manner in which the equipment was kept up there and here? I am not asking you to criticise anybody.

A. It is rather embarrassing. I am still in the army. There is equipment damage and building damage and machinery damage at the Omaha quartermaster laundry that I have been ordered by representatives of the Quartermaster General Department to prevent against and take care of when I was operating government plants.

Q. For example?

A. For example, the exterior parts of this machinery that needs paint, and the plant I had out there, we had wooden washers with metal parts, motor and gears and engines, and so on, gauges and extractors, were metal. I [fol. 385] was ordered by technical inspectors in the office of the Quartermaster General to requisition paint and to secure the necessary labor and without delay completely repaint the extractors and all metal parts on the washers in order to prevent against rust. There was no rust on them. The paint had been chipped and was wearing through, but on his recommendation, which amounts to an order, I did it, and I was informed to draw the paint—it was a very hard item at that time to get—but I was told to requisition this paint on the basis that

it was needed to prevent against rust on metal equipment and I would experience no difficulty and I didn't, and I got it immediately on that basis. So far as the building is concerned, an army installation, I have been only at army posts. A commanding officer of an army post takes a certain amount of pride in the way his post is kept up, in the appearance it presents, and I can't imagine any of the commanding officers I have worked for permitting me to let my building stay in a condition comparable to the one down here without at least my putting in a work order for it.

Q. How long did it take you to build the Carson laun-
[fol. 386] dry, to get it together, by the government?

Mr. Murphy: Objected to as irrelevant and immaterial and not within the issue.

The Court: I don't see the materiality. Sustained.

Q. Knowing the Kimball Laundry Company as you do and without taking into consideration anything but the physical assets; that is, the building, machinery and power plant and equipment, what would you say would be a fair sum for the Kimball Laundry Company to receive for the temporary use of that property for a period of three years, seven months and eight days? That is, from November 22, 1942, in the shape it was then?

The Court: Through June, 1946. From that date, what would that value be as of the 22nd day of November, 1942? A. About $570,000.00.

Q. That would include the work to rehabilitate and fix up the plant?

A. Yes, that includes now the restoration of the building, grounds and equipment and power equipment in the condition it was when it was taken over.

Q. In other words, to bring it back to where it was in November, 1942?

A. Yes, and pay us for the temporary use of it.

[fol. 387] Q. You were in charge, I think you said, of sales of the Kimball Laundry Company while you were there? A. Yes.

Q. What did that mean?

A. I had charge of route men, supervisors. I arranged for the advertising. I arranged price structures in conjunction with Al, and in his absence supervised the production operations of the plant, in return for which, in my absence he supervised the operation of the sales department.

Q. In this figure you gave, $570,000.00, do you include any loss of customers, routes, loss of business, or good will? A. I did not.

Mr. Hotz: I think that is all, with the exception, if you will permit it, I want him to identify one exhibit or two that were not admitted.

The Court: Haven't they been identified?

Mr. Hotz: They have been identified, but I want to ask him if the figures on there meet with his approval.

The Court: I will not permit it. The testimony is out.

Mr. Hotz: These have been admitted in evidence, Exhibits 10, 11 and 12; Exhibit 10 being an itemization of [fol. 388] Kimball Laundry Company's classified laundry work from 1936 to November, 1942, with totals for each year and for the period. It is one identified by Mr. McDougal.

Q. Were those figures taken from the department you had charge of at the Kimball Laundry Company?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial, the expert who compiled the figures having been in court and testified and identified the exhibit.

The Court: You say these are in evidence?

Mr. Hotz: Yes.

The Court: That is already established.

Q. Calling your attention to Exhibits 11 and 12, that show the number of customers and the trade routes and so forth, were those in your department?

Mr. Murphy: Objected to as incompetent and immaterial whose department they are in. The exhibits have been heretofore excluded from evidence.

Mr. Hotz: They were not excluded.

The Court: They were received for the purpose of showing capacity of the plant. What more is there that this gentleman can testify to?

Mr. Hotz: The accuracy of them. I want him to verify [fol. 389] the accuracy of them.

Mr. Murphy: Objected to as incompetent and immaterial.

The Court: No one is questioning the accuracy.

Mr. Hotz: I don't know.

The Court: I am telling you they are not.

Mr. Hotz: Very well. These exhibits were excluded and I want to make an offer of proof from this witness.

The Court: You have already made the offer of proof.

Mr. Hotz: But not from this witness.

The Court: It doesn't matter. You have already made the offer of proof, and for the purpose of your offer, they are accepted to be what they purport to be. There is nothing more this witness can add.

Mr. Hotz: We are referring now to Exhibits 14, 15, 16 and 17—

The Court: And let the record show any further offer of these exhibits will not be permitted and counsel will desist from proceeding in this way.

Cross-Examination of Fred Jacobberger
by Mr. Murphy:

Q. What elements go to make up your figure of $570,000.00?

[fol. 390] A. In round figures there is $220,000.00 necessary to repair and replace parts of the building, power equipment, laundry machinery, in order to place the plant in the same condition it was November 22, 1942.

Q. You are taking these other figures. You didn't make any personal investigation of that?

A. I solicited no bids, no, sir.

Q. Go ahead.

A. In my opinion the fair value for the temporary use of the building, ground, power equipment and machinery of the Kimball Laundry Company, as it existed on November 22, 1942, is worth $100,000.00 per year.

Q. What elements did you consider and have in mind in arriving at that $100,000.00 per year?

A. First of all, I considered that in arriving at this figure I should assume I was in a position where I was renting this property voluntarily, which I was not. Assuming that I had been, the value of that property at that time, only the physical property, amounted to the best figures I could obtain to approximately $650,000.00. The government for income tax purposes allowed us to reflect a depreciation on our books each year of approximately $26,000.00. This is not the rate at which the equip- [fol. 391] ment, building, or anything else depreciated. It was the amount set up by the government and given to us that we might withdraw from that business and exempt from our income tax payments under their own rules. I felt we were entitled to that $26,000.00.

Q. I don't mean to interrupt you—$26,000.00 a year out of the $100,000.00 a year?

A. I felt we were entitled to that. I would certainly ask it should anyone want to rent the place from me. There was then a figure for taxes and insurance and a few minor expenses such as storage of these trucks that we had to go to—

Q. Pardon me for interrupting again. Let's get them separately if we may.

A. I can't tell you that. That is my opinion, my estimate and it is a round figure, and my estimates of these amounts must necessarily be round figures.

Q. I understand that and I am not trying to pin you down to exact figures. Your uncles have testified to taxes and insurance at $7,000.00 a year. As far as you know that is about right?

A. Yes, sir. If you take that figure you have $33,000.00 a year so far. The maximum—at least I figured that with an investment, the amount of money that we had in the physical assets at that time, November, 1942, and the [fol. 392] time since then, we were entitled to and could have easily elsewhere received, a return of 10 per cent on that investment, which amounts to $65,000.00 per year. That, of course, is my own opinion. I think with that amount of money to invest I could have done

it. I would have thought so at that time. There were also a few other considerations for which I didn't figure I would buy anything or receive a bill from anyone, but the rent or use of this building and grounds and equipment was put up to me, at least, as a temporary proposition—no one said for how long and no one gave me the right to say for how long. The use was to be from November 22, 1942, on, at the pleasure of the government. When you are renting a piece of property, the time on which you can count on renting this, and the definite length of time that the rent covers, to me makes a certain amount of difference in the value of the lease. I figured because of the indefiniteness of this, and knowing it was indefinite, we would be put to additional expense in maintaining the place and paying our expense of of seeing this thing through. A conservative estimate on my part would place the value of the temporary use of that property at $100,000.00 per year.

[fol. 393] Q. So there is no misunderstanding, and I think there is not, and using round figures, not pinning down to exact hundreds or thousands, we will take $26,000.00 a year depreciation? A. Yes, sir.

Q. Approximately $7,000.00 a year taxes and insurance? A. Yes, sir.

Q. Approximately $65,000.00 as 10% on an investment of $650,000.00, and then adding a little something to that because of the uncertainty of time—

A. Yes, an indeterminate figure.

Q. —and that gets your $100,000.00 a year?

A. Yes, at least that.

Q. And that makes $350,000.00, added to your $220,000.00, you have obtained from others for repair, restoration and renovation—

A. I haven't obtained them. I have just seen them.

Q. But, anyway, that is the figure, $220,000.00?

A. Yes.

Q. And that makes your total $570,000.00?

A. As close as I can arrive at it, yes, sir.

Mr. Murphy: Just a few more questions.

Q. As I understood you to say, the Jefferson Barracks laundry was a government-owned plant? A. Yes, sir.
[fol. 394] Q. And also the Camp Carson laundry?
A. Yes, sir.
Q. Both of those were one-story structures?
A. Yes, sir.
Q. Not multi-floor structures? A. No, sir.
Q. At least out at Camp Carson they had a frame building instead of a brick and concrete one? A. Yes.
Q. And they had these factory washing machines of wood instead of your metal machines you have down at the Kimball Laundry? A. Yes.
Q. And with that equipment you turned out a good and satisfactory job for all these thousands of soldiers at Camp Carson? A. That was my opinion.
Witness excused.
Mr. Murphy: If the court please, I understand the court's ruling, I am quite sure, but I also believe in order to properly make the record, I shall nevertheless renew a particular motion as to some of the testimony of this witness.
The Court: Very well.
Mr. Murphy: Petitioner moves the court to strike from the evidence and to instruct the jury to deduct from the [fol. 395] gross figure of use value in the sum of $570,000.00 from the testimony of this witness, Fred Jacobberger, and to entirely disregard the further sum of $93,600.00, constituting claim of depreciation to that extent on the laundry machinery here involved, for the reason that said last mentioned sum constitutes a duplication and is included and covered by the figure and claim of $153,131.54, constituting the difference in value according to respondent's own witnesses of the said laundry machinery between the date of taking and the present time, and which last mentioned figure includes all items of depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

The Court: I will instruct the jury with reference to these items when the proper time comes. Same ruling.

Mr. Hotz: The respondent, now the plaintiff in this action, rests, with one exception, that we may have forgotten some item or some small thing, and if we have, to withdraw our rest. We will ask that privilege later.

The Court: We will meet that question when we come to it. If you have testimony, now is the time to present it.

[fol. 396] Mr. Hotz: We know of no reason, now. We know of no reason why we should have to.

The Court: So far as you are advised, with all the information you have at hand, you are now prepared to rest?

Mr. Hotz: That is correct.

The Court: And you do rest?

Mr. Hotz: That is right.

And the Government, to maintain the issues in its behalf to be maintained, adduced evidence as follows:

(See Volume II—Government's Witnesses) Paging in Vol. II—Government's Witnesses—begins with Page 397, and continues, original record.

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Vol. III

TRANSCRIPT OF RECORD

(Pages 461 to 868)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

No. 529.539 63

VOLUME III

TRANSCRIPT OF RECORD

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 13494

CIVIL

KIMBALL LAUNDRY COMPANY, A Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

FILED FEBRUARY 11, 1947

CONTENTS

[This Volume III contains the testimony introduced and proceedings at the trial by the petitioner, United States of America, appellee in U. S. C. C. A.]

Printed Record

FILED
MAR - 2 1947
H. H. WOOD
CLERK

EXPLANATION OF RECORDS

A Condemnation Case from U. S. D. C. of Nebraska, Omaha Division

The printed record on the appeal to U. S. C. C. A. consists of *three* separate, bound volumes as follows:

Volume I. Pages 1 to 180	The filings and entries in the office of the Clerk of the U. S. D. C. at Omaha; court's instructions; appeal papers to U. S. C. C. A.; certificates of both Clerks.
Volume II. Pages 181 to 460	The testimony introduced and proceedings at the trial by the respondent, Kimball Laundry Co., appellant in U. S. C. C. A.
Volume III. Pages 461 to 868	The testimony introduced and proceedings at the trial by the petitioner, United States of America, appellee in U. S. C. C. A.

The original typewritten record made by the official court reporter in the United States District Court consisted of four separate volumes of the proceedings at the trial. The original typewritten Volumes I (pp. 1-396) and III (pp. 1050-1097) contained the oral testimony and exhibits of the respondent, Kimball Laundry Company, the exhibits being separately bound by the court reporter in said Volume III. The original typewritten Volume II (pp. 397-915, 916-1009, 1010-1049D) and Volume IV (pp. 1098-1192) consisted of the oral testimony and exhibits of the petitioner, the United States of America; the exhibits being bound separately in said Volume IV. A separate typewritten index was compiled by the court reporter for these four typewritten volumes.

The transcript of the Clerk of the United States District Court consisted of 174 pages.

These four original typewritten volumes plus the transcript of the Clerk of the U. S. D. C. constitute the original records from the U. S. D. C. These originals have all been compiled into the aforementioned *three printed volumes* for the U. S. C. C. A.

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1. Statement		
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2. List of services and repairs to laundry and dry cleaning equipment		
Identified	Vol. II, 398	461
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Received	Vol. II, 474	505
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3. List of replacement parts of laundry and dry cleaning equipment		

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Identified	Vol. II, 403	464
Offered	Vol. II, 408	467
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Offer renewed	Vol. II, 411 466	468, 500
4. List of expendable machinery parts		
Identified	Vol. II, 405	465
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Received	Vol. II, 474	505
Found	Vol. IV, 1101	506
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5. Entries in books of post engineers, Fort Omaha, concerning expenditures of QM Laundry		
Identified	Vol. II, 421	474
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5-A Substitution for Ex. 5, p. 459	Vol. IV, 1102	477
6. Redraft of Ex. 2		
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Received	Vol. II, 474	505
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8. List of maintenance men employed by govt. at K. L. Co.		
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Received		Vol. II, 474	505
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9. Floor plans of Kimball Laundry Co.			
Identified		Vol. II, 495	518
Offered		Vol. II, 683	634
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Found		Vol. IV, 1106	634
10. Report of LaTurner and Newcom, govt. witness experts			
Part 1			
Identified		Vol. II, 555	550
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11. Report of LaTurner and Newcom, experts			
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12. Summary sheet of cost of parts			
Identified		Vol. II, 562	554
Offered		Vol. II, 563	555
Received		Vol. II, 564	555
Found		Vol. IV, 1109	567
12-A Grand totals of equipment			
Identified		Vol. II, 629	601
Offered		Vol. II, 683	634
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Identified		Vol. II, 630	601

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13. Letter repainting by contractor Schaap
Identified ..... Vol. II, 636 605
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Received ..... Vol. II, 637 605
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14. Additional bid submitted for enamel and gloss finish paint job at K. L. Co.
Identified ..... Vol. II, 636 605
Offered ..... Vol. II, 637 605
Received ..... Vol. II, 637 605
Found ..... Vol. IV, 1113 606

15. Bid for paitning by contractor Schaap
Identified ..... Vol. II, 636 605
Offered ..... Vol. II, 637 605
Received ..... Vol. II, 637 605
Found ..... Vol. IV, 1114 607

16. Blue print of floors of K. L. Co.
Identified ..... Vol. II, 661 621
Offered ..... Vol. II, 683 634
Received ..... Vol. II, 683 634
Found ..... Vol. IV, 1115 634

17. List (of what) pertaining to power plant building
Identified ..... Vol. II, 644 611
Offered ..... Vol. II, 683 634
Received ..... Vol. II, 685 635
Found ..... Vol. IV, 1116 636

18. Compilation for restoration cost of Kimball Laundry Co.
Identified ..... Vol. II, 663 622
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	Original	Printed
Received	Vol. II, 685	Vol. III 611
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19. Inventory of equipment and machinery.		
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20. Not offered		
21. Work sheets for restoration prepared by witnesses		
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22. Summary prepared by Weber of his testimony		
Identified	Vol. II, 819	735
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Received	Vol. II, 819	735
Found	Vol. IV, 1120	735-7
23. Summation prepared by Weber of his testimony		
Identified	Vol. II, 842	750
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24. Summary of Lewis Sholes testimony prepared by witness		
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KIMBALL LAUNDRY CO. EXHIBITS OFFERED IN REBUTTAL:

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	Original	Printed Vol. III
6 Page 7 of K. L. Co. Ex. 6		
Identified	Vol. II, 998	856
Offered	Vol. II, 998	856
Refused	Vol. II, 999	857
Found	Vol. III, 1055	Vol. II, 218
21-A Tabulation by Dahlquist-Goodwin, Kinder		
Identified	Vol. II, 976	
Offered	Vol. II, 976	
Received	Vol. II, 976	
Found	Vol. III, 1066	
45. List of items of machinery and parts moved from Omaha QM Laundry to warehouse at Fort Omaha by govt.		
Identified	Vol. II, 735	683
Offered	Vol. II, 736	684
Received	Vol. II, 736	684
Found	Vol. III, 1088	684-7
46. Not offered		
47. Not offered		
48. Summary and tabulation of Peter Dahlquist, expert		
Identified	Vol. II, 951	822
Offered	Vol. II, 952	822
Received	Vol. II, 952	822
Found	Vol. III, 1089	822-3
49. Summary and tabulation of Peter Dahlquist, expert		
Identified	Vol. II, 952	822
Offered	Vol. II, 952	822
Received	Vol. II, 952	822
Found	Vol. III, 1090	822-3
50. Summary and tabulation of Peter Dahlquist, expert		
Identified	Vol. II, 952	822
Offered	Vol. II, 952	822
Received	Vol. II, 952	822
Found	Vol. III, 1091	822

	Original	Printed Vol. III
51. Copy of letter from Steinheimer to Rorick re painting job at K-L. Co.		
Identified	Vol. II, 956	825
Offered	Vol. II, 956	825
Received	Vol. II, 957	825
Found	Vol. III, 1092	826
52. Bid of Steinheimer to Rorick Construction Co. for painting job at K. L. Co.		
Identified	Vol. II, 960	827
Offered	Vol. II, 961	828
Refused	Vol. II, 962	829
Found	Vol. III, 1093	829
53. Estimate of Peter Kiewit, showing cost to repair building of K. L. Co.		
Identified	Vol. II, 967	832
Offered	Vol. II, 967	833
Refused	Vol. II, 970	835
Found	Vol. III, 1094	835-8
54. Itemized list of A. L. Jacobberger and total showing items included in Kimball Laundry Ex. 21 that should have been excluded. Correction.		
Identified	Vol. II, 971	839
Offered	Vol. II, 972	839
Received	Vol. II, 973	840
Found	Vol. III, 1095	840
55. Letter from J. J. Hanighen Co., re cost of boilers		
Identified	V .. II, 983	846
Offered	Vol. II, 894	847
Refused	Vol. II, 984	847
Found	Vol. III, 1096	847
56. Compilation of figures of A. L. Jacobberger to show capacity in poundage		
Identified	Vol. II, 1006	861
Offered	Vol. II, 1008	861
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	Original	Printed Vol III
Exhibit	Vol III, 1097	862
Offers to Prove (All by Kimball Laundry)		
Offer in testimony of A. L. Jacobberger in rebuttal to prove cost of repairs on machinery	Vol. II, 979	843
Offer on Exhibit 55	Vol. II, 984	847
Offer of testimony of A. L. Jacobberger to prove cost of equipment on books	Vol. II, 1000	857
Stipulation on date of filing petition, etc.	Vol. II, 845	757
After trial and judgment, application of Kimball Laundry Co., for order to withdraw partial funds from the Registry of the Court after judgment, without prejudice to appeal. Order granted by U. S. D. C. to withdraw funds in part without prejudice to appeal	Vol. II, 1049A	Vol. I, 137-9
Motion of petitioner to strike petition of K. L. Co. on appeal from appraisers—sustained	Vol. II, 1008	863
Instruction of the court given to the jury during trial of the case	Vol. I, 4 96 282 Vol. II, 460 928	Vol. II, 185 257 388 Vol. III, 497 808
Instructions of the court given at the close of all testimony	Vol. II, 1040	Vol. I, 150, 167
Exceptions of Kimball Laundry Co. to instructions of the court	Vol. II, 1036	Vol. I, 165
Exceptions of Government to instructions of the court	Vol. II, 1039	Vol. I, 166
Requested instructions of Government	Vol. II, 1042-A	Vol. I, 169
Requested instructions of Kimball Laundry Co.	Vol. II, 1042-F	Vol. I, 172
Verdict of the jury	Vol. II, 1045	Vol. I, 95 Vol. III, 863

[fol. 397] MR. WILLIAM MOISTER, JR., produced as a witness on behalf of the *Government*, being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please? A. William Moister, Jr.

Q. Where do you live at present? A. 3319 Dodge.

Q. Are you an officer of the United States Army?

A. Yes.

Q. Rank of Lieutenant? A. Yes, sir.

Q. What is your present assignment as such officer of the United States Army?

A. Commanding officer, Omaha Quartermaster Laundry.

Q. That is the former Kimball Laundry plant here in Omaha, is it? A. Yes, sir.

Q. How long have you been such commanding officer of that plant?

A. Since about the middle of November, 1945.

Q. As such commanding officer, do you have charge and direction of all books and records of that plant?

A. They are my responsibility, yes, sir.

Q. Are they kept under your direction and supervision [fol. 398] and control? A. Yes, sir.

Q. Are those the official records of the government and of the war department? A. Yes, sir.

Q. Have you, at our request, had taken under your immediate direction from those official original records, lists of maintenance and repair items as disclosed by those official records and showing repairs made on this plant and machinery during the occupancy by the Quartermaster Corps of the army? A. Yes, sir.

Q. I will hand you what the Reporter has marked as Government's Exhibit 2, and ask you to state, if you will please, and without reading any of the figures or items thereon as yet, what that exhibit consists of, what that is?

A. This is a list of payments made for services and repair to laundry and dry cleaning machinery and equipment at Omaha Quartermaster Laundry, 1502 Jones Street, Omaha 2, Nebraska, from 15 December 1942 to 15 December 1945 and through the present.

Q. Is that one of the lists that I asked you about a while ago as being compiled under your direction from the official records of that government laundry and which [fol. 399] records are under your custody and control?

A. Yes, sir.

Q. Does that correctly reflect those records?

A. Yes, sir.

Q. Attached to the typewritten sheets is a thin strip of paper. What is that?

A. It is a tabulation of the figures showing the total.

Q. From an adding machine? A. Yes, sir.

Mr. Murphy: The government now offers in evidence Government's Exhibit 2.

Mr. Hotz: May I examine the witness a moment?

The Court: Better examine the report first and then examine the witness.

Mr. Hotz: I know what it is.

Mr. Hotz: Q. You compiled this report from engineer's invoices that came into the office, did you not?

A. Let me see that. No, sir. This is compiled from invoices which are on file at the laundry for services and repairs by outsiders, not including that work done by the engineers.

Mr. Hotz: Q. But it was under the engineers' direction that the work was done? That is what I mean.

[fol. 400] A. No, sir, not to my knowledge. This is work other than that.

Mr. Hotz: Q. You don't know? You couldn't tell us of your own personal knowledge whether this work was done on the machinery or not in that plant? The only thing you did was to compile the invoices you found on hand at the Kimball Laundry Company, isn't that true?

A. What do you mean when you say that I don't know if has been done?

Mr. Hotz: Who made the compilation?

A. Who made the compilation of records?

Mr. Hotz: Q. Yes, and we don't question that you did not do that, Lieutenant, but what I am getting at, you cannot tell from this exhibit, of your own personal knowledge, whether or not the work was done on that particular

machine, or who did it?

A. That work—no, sir, not by looking at that list you can't.

Mr. Hotz: Q. So that all you have here is a compilation of figures that were taken from invoices you found in the office? A. That is right, sir.

Mr. Hotz: And this doesn't reflect anything else than that as to the accuracy of the items, whether or not they [fol. 401] were expended, as a matter of fact, on the particular machines, or who did the work, or what was done, excepting as these invoices show? A. Yes, sir.

Mr. Hotz: We object to the introduction of Government's Exhibit 2 as not the best evidence and not tending to prove any of the issues in the case, and incompetent, irrelevant and immaterial.

The Court: Do you have these invoices in your possession here, Lieutenant? A. No, sir.

The Court: They are part of the government's records? A. Yes.

The Court: And the government records are under your care and supervision? A. Yes, sir.

The Court: Are they available to the plaintiffs or the claimants here if they wish to see the original documents?

A. Technically they are, on the permission of headquarters of the Seventh Service Command, but otherwise, I would say they are not available to them unless they have permission to look at them.

Mr. Murphy: May I state to the court, I will see to it about such permission. It is merely a routine matter of [fol. 402] getting such permission, if it is desired.

The Court: Mr. Hotz, do you wish these invoices brought into court?

Mr. Hotz: How many more of these do you have?

Mr. Murphy: Two more here. These are not the engineer's. I will have that separately.

Mr. Hotz: Do you know whether or not these purchases were installed on these machines in the Kimball Larndry Company given on the list, Exhibit 2?

The Court: He has already stated that he doesn't pretend to claim to know. He says this is a list taken from

the official documents in his possession and under his control down there. Now, the inquiry is, do you wish to have these documents brought into court?

Mr. Hotz: We will have to see the original invoices.

The Court: Mr. Murphy, will you kindly arrange with someone to secure these documents and bring them up here?

Mr. Murphy: I will have to have some time. I probably can't get them here before Monday morning.

The Court: You will see they are here Monday morning and we will pass this ruling on the offer until you produce them.

[fol. 403] Mr. Hotz: It would save time if Mr. Murphy could get them to us tomorrow.

The Court: We are not going to require Mr. Murphy to do it tonight. He is going to be here as late as you are. Monday morning they will be here in court and you will have an opportunity to inspect them. You say you know what they are, and if you do—

Mr. Hotz: I know the nature of them.

Mr. Murphy: The witness is here and I will take care of the preliminary identifications at this time.

Q. Now, Lieutenant, I will hand you what the Reporter has marked Government's Exhibit 3, with a thin tabulation strip attached, and ask you to state what the typewritten major item is, without, again, stating the figures or items thereon listed?

A. This is a list showing replacement parts, laundry and dry cleaning machinery at Omaha Quartermaster Laundry, Omaha 2, Nebraska, from December, 1942, through the present.

Q. What is the difference if any between Exhibits 2 and 3? Why are there two different lists?

A. Exhibit 3 is a list of parts that have been used to replace, or been used, or consumed in the laundry in Nebraska. Exhibit 2 is a list of services, of payments for services by outside concerns for different repairs.

[fol. 404] Q. Referring again to Exhibit 3, is the thin strip attached an adding machine tabulation showing the total of the items listed on the exhibit proper? A. Yes, sir.

Q. And as to Government's Exhibit 3, I will ask you whether it likewise was made up and compiled by you, or under your immediate direction, from the official government records under your direction, custody and control?

A. Yes, sir.

Q. And does Exhibit 3 correctly reflect the items and amounts therein as shown by those original official records under your control? A. To the best of my ability.

Q. And are the items totaled and the total correctly listed at the end of the list? A. Yes, sir.

Q. Now, again, without reciting any of the figures or amounts, I notice at the left side of the sheet, Exhibit 3, there is a column of dates. Are those dates upon which the particular item of work was done or part furnished?

A. Yes, sir.

Q. And then in the body of the sheet, as in more solid [fol. 405] type, various descriptions. Are those the descriptions of the part and work done?

A. That is the description of the part, or in that case, the work performed.

Q. On Exhibit 3 there is a description of the part, and on Exhibit 2 a description of the work done, as I understand it? A. Yes.

Q. And at the extreme right-hand side of the sheet I notice a list of figures. Are those the charge, or price for the part, or respectively the labor, as shown on the two exhibits 2 and 3? A. Yes, sir.

Q. And Exhibit 2, that I happen to have in my hand, does not have a dollar sign on it, but am I correct in my assumption those figures are dollars and cents figures?

A. Yes.

Q. Both on Exhibits 2 and 3 on the right-hand side?

A. Yes, sir.

Q. I will hand you what the Reporter has marked Government's Exhibit 4, with a similar adding machine tabulation sheet attached, and ask you in the same manner, to state what that is, and without saying anything at this time, or mentioning any of the items thereon.

[fol. 406] A. This is a list of expendable machinery parts which were carried on another ledger, or carried separately

from those, and carried among expendable supplies, and totaled and compiled in a list.

Q. Are those, then, the cost items of additional repair parts? A. Yes, sir.

Q. And have those parts been used in repairs of the laundry machinery in the plant? A. Yes, sir.

The Court: What do you mean by the term "expendable"?

Q. What do you mean by the term "expendable"?

A. They are a certain classification of items. Expendable items are items which wear out and deteriorate and not carried on the books once they deteriorate, and you charge them off. If you have seven and use two, you are not responsible for that two. That is out. Where you have nonexpendable, if you have seven to begin with and use two, you must get credit for the other two before you clear your records.

The Court: For example, what are they, steel or wood or copper or brass or paper?

A. A nonexpendable item would be paper, but this does not include such things as paper and soap. These are machines that are expendable.

Q. Name some of the parts included in that.

A. That I don't know as I can do.

Q. Will you check that between now and Monday?

A. Yes.

Q. You can determine that from your records there?

A. Yes, sir.

Q. They are, if I understand your testimony correctly, the small parts that are purely repair items, that wear out from time to time and then are discarded and replaced, as distinguished from the more substantial machinery or machinery parts? A. Yes, sir.

Q. And are kept separately on your records down there and hence you have a separate list? A. Yes.

Q. As to Government's Exhibit 4, I will also ask you whether that exhibit was likewise compiled by you, or under your immediate direction from the official government records in your charge, custody and control.

A. Yes, sir.

Q. And does it correctly reflect those original records?
A. Yes, sir.

[fol. 408] And have you totaled the items thereon at the bottom of the last page? A. Yes, sir.

Q. And there are, at least on the first page, some seven columns, approximately six on the second, and a lesser number on the last two. Are the figures in each of those columns dollars and cents figures? A. Yes, sir.

Mr. Murphy: The Government, at this time, offers separately, Government's Exhibit 3 and Government's Exhibit 4, each with the attached tabulation as a part of the exhibit.

Mr. Hotz: I would like to ask the witness a question or two.

The Court: Very well.

Mr. Hotz: Q. In connection with Exhibit 3, this, you said, was a list of parts, is that right?

A. That is right, sir.

Mr. Hotz: Q. Do you know whether they were installed parts or just an invoice of parts to the Quartermaster Corps that came down on those various dates shown on the left-hand column? A. I got them from the invoices.

Mr. Hotz: Q. Some of them may be there in stock yet?

[fol. 409] A. No, not if our records are right.

Mr. Hotz: Q. But you had nothing to do with the installation of these parts, did you, so that you could give us any personal knowledge that you know they were installed? A. No, sir.

Mr. Hotz: Q. Because you were not there?

A. That is right.

Mr. Hotz: Q. What you did was simply take the invoices and make a tabulation of invoices that somebody else had sent down? A. That is right.

Mr. Hotz: Q. In connection with Exhibit 4, which was machine parts, would your answers be the same in connection with that exhibit as with Exhibit 3? That is, you don't know whether these were installed or not, or where they are?

A. I would know they are not in the laundry unless they have been installed. If our records are right they

have been installed.

Mr. Hotz: Q. If your records are right—are you referring to Exhibit 4 or 3?

A. Referring to that exhibit you have.

Mr. Hotz: Exhibit 4? A. Yes.

[fol. 410] Mr. Hotz: Q. It is only a question of whether the records are right; there is no personal knowledge upon your part of any of these items of installation, is that right? A. On that sheet?

Mr. Hotz: Q. Yes. A That is right, sir.

Mr. Hotz: Q. And that would apply also to Exhibit 3?

A. I don't know. I haven't looked at it closely enough to know about that.

Mr. Hotz: Q. And the original invoices are available?

A. Yes, sir.

Mr. Hotz: Q. Isn't that right? A. Yes, sir.

Mr. Hotz: Q. And the facilities to check are available as to where this stuff is? A. I suppose so.

Mr. Hotz: Q. If parts were ordered for the Quartermaster Corps here in this area, the charge would be made to the Quartermaster Corps for this area and for this installation, would it not, and that is what you might call installation, the Kimball Laundry installation, would it not?

[fol. 411] Mr. Murphy: Object to that as not the best evidence, counsel having insisted on producing the official records and they will speak for themselves.

The Court: Yes, we will hold up the ruling until you get your official records Monday morning and then you will be in a position.

Mr. Hotz: In the meantime, I will make my objection to Exhibits 3 and 4.

Mr. Murphy: I want to ask one more question before you do.

Q. Lieutenant, I want to ask you one further question in this particular connection and that is, whether or not these official records from which the Exhibits 2, 3 and 4 were taken, are the official government records upon which you rely in conducting the business of the Quartermaster Laundry? A. That is right, sir.

Mr. Murphy: We, perhaps, must renew our offer to keep the record straight, after that question.

Mr. Hotz: We renew our objection.

The Court: What is the objection?

Mr. Hotz: Incompetent, irrelevant and immaterial; not the best evidence; the witness not having been able to properly identify them in connection with Kimball Laundry Company, excepting that he compiled a list and came [fol. 412] there in 1945, the first time he came there, and found these invoices and made a list of them.

The Court: What is the objection? On the basis that it is not the best evidence?

Mr. Hotz: Yes.

The Court: You are calling for the original books and papers?

Mr. Hotz: Yes.

The Court: For that reason, and no other reason, the offer will now be held in abeyance until counsel has been able to produce the original papers, so we will pass on now to something else.

Mr. Hotz: I ask counsel if they have copies of those exhibits for us?

Mr. Murphy: I don't.

The Court: We will have the originals here Monday.

Mr. Hotz: Later I want to ask another question. I notice some of these exhibits as they are made, they apparently are typewritten; that is, I mean they are carbon copies; two of them are carbon copies and one is in pencil notations. Exhibit 4 is in pencil. Is that your handwriting in the pencil notations? A. No, sir.

Mr. Hotz: Q. Not your handwriting?

[fol. 413] A. No, sir.

Mr. Hotz: Can't we have copies of these; not the originals?

Mr. Murphy: In answer to counsel's question, I think there is an original and that is in the hands of one of the men in the office, who is simply trying to compile these things in a brief and more condensed form, and for

that reason I don't happen to have another copy for you at this time.

Q. What if anything else was done in the way of maintenance and repair of machinery in the Quartermaster Laundry in question here? Were any more men employed down there for that purpose? A. Yes, sir.

Mr. Hotz: Object to that unless he confines it to some time.

The Court: He will follow up. This is a general question. The next question will be who and when and how. You are anticipating. Go ahead.

Q. Let's first get the time you have been there—under your personal knowledge and direction, have there been any men so employed? A. Yes, sir.

Q. How many?

[fol. 414] A. Two or three.

Q. Have there been at least two men employed there full time? A. Yes, sir.

Q. And sometimes three? A. Yes, sir.

Q. And were they paid a salary by the government?

A. Yes, sir.

Q. Government employees? A. Yes, sir.

Q. And is their salary separate and in addition to any of these records, Exhibits 2 and 3 and 4 here? A. Yes, sir.

Q. And what was the duty and work of these men during the time you have been in charge of this laundry?

A. To carry out maintenance on laundry machinery.

Q. Did they operate there full time at that work down there? A. Yes, sir.

Q. And under whose immediate direction were they working?

A. They are under the plant superintendent's immediate direction.

Q. Who has been the plant superintendent of the laundry ever since you have been here?

A. Mr. Al Jacobberger.

[fol. 415] Q. And he has been down there as a government emplyee as superintendent of that plant? A. Yes, sir.

Q. And two or three maintenance men under his direction? A. Yes, sir.

Q. Is it part of the duty of Mr. Al Jacobberger to keep that plant in repair? A. Yes, sir.

Mr. Murphy: Under the circumstances, I think it is proper to permit cross-examination now, but not waiving right for further redirect examination when we have the records here Monday.

Cross-Examination of William Moister by Mr. Hotz:

Q. What is the man's name that worked there? You said there were two or three men and I want their names.

A. Lloyd S. Loving.

Q. Is he a soldier? A. No, he is a civilian employee.

Q. Employed by whom? A. United States Government.

Q. Under whose direction? Under what department?

A. He is the maintenance engineer.

Q. He is the maintenance engineer?

A. Under the Quartermaster Laundry.

Q. Is that yourself?

[fol. 416] A. Yes, sir.

Q. What is the other man's name? A. Earl Hayes.

Q. Is he a civilian?

A. Yes, sir and he is an assistant to the other one.

Q. And he also is employed under the officer in charge of the Quartermaster Corps? A. That is right, sir.

Q. That is yourself? A. That is right.

Q. And the third one?

A. Well, there were three, but there are not three now. There were three when they had three shifts.

Q. What was the othr man's name?

A. We have had several. One was Harry Thompson.

Q. And he was similarly employed and similarly responsible to you?

A. He left shortly after I came there. He was there a period of time while I was there.

Q. A very short time? A. A very short time.

Q. What did these men do? Did they go about the plant and do whatever work they were directed to do?

A. Yes, sir.

Q. In reference to keeping things up?

[fol. 417] A. Yes, sir.

Q. And as far as you know, from your own personal knowledge, that was from the time you came there, which was November of 1945, up until the present?

A. That is right.

Q. As far as these maintenance men are concerned, do you have one there now? A. We have two there now.

Q. Has there been a change in the amount of work these men would have to do from the time you came in there in November, 1945, up until now? I mean by that, a lessening in the amount of work?

A. I should imagine so.

Q. In other words, it has fallen down to a point—the war is over and it is coming to an end?

A. I don't know whether you are trying to cross me up or what you are doing.

Q. No, sir, what I am trying to do is to show that the work at the plant is coming to a standstill—naturally, the laundry is not coming in from soldiers, to speak of—it is getting less and less.

A. When you speak about maintenance men, that has nothing to do with them.

Q. That is right, but the work is getting less at the plant, isn't that right?

[fol. 418] A. That is right.

Q. Even from the time you came there, from November down until now, it was getting less?

A. You mean laundry that is coming in?

Q. Yes. A. That is right.

Mr. Hotz: That is all I meant. That is all.

Redirect Examination of William Moister by Mr. Murphy:

Q. Do your records down there in the plant also reflect the name of the maintenance engineers over the past three and one-half years? A. Yes, sir.

Q. Will you keep that in mind so when we get these records we want their names over the period of time prior

to the time you were there; their names and their periods of employment and their salaries? A. Yes.

Q. Do you know the salary these two men you have just mentioned, Mr. Hayes and Mr. Loving, received?

A. During 1945, take as an example, one made $3,000.00, and the other made some three thousand odd dollars, and the other a little over $4,000, or $7,000.00 between them.

Q. Paid by the government for these two men in 1945 for maintenance work on the machinery and plant down there?

[fol. 419] A. Yes, sir.

Recross-Examination of William Moister by Mr. Hotz:

Q. Did you have any laundry experience personally in your career?

Mr. Murphy: Objected to as irrelevant and immaterial, the witness not having attempted to testify to anything as an expert.

The Court: Sustained.

Mr. Hotz: That is all.

Mr. Murphy: That is all.

[fol. 420] HELEN M. HERGERT, produced as a witness on behalf of the *Government,* being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please? A. Helen M. Hergert.

Q. Where do you live A. 3008 Webster Street, Omaha.

Q. Where are you employed?

A. Fort Omaha, Nebraska.

Q. In what capacity? A. Cost accounting clerk.

Q. You are employed as a cost accountant at Fort Omaha? A. Yes.

Q. What particular department?

A. Post Engineer's office.

Q. Is it part of your regular duties to keep the books and records of the Post Engineer, among other things,

with reference to items of repair and replacement of the Quartermaster Laundry, or formerly Kimball Laundry plant here in Omaha? A. Yes, sir.

Q. Have you brought with you, and do you have in the courtroom, the original official records of the Post Engineer's office at Fort Omaha, showing those items?

[fol. 421] A. I do.

Q. Have you, at our request, and under your direction had compiled a typewritten list showing those items?

A. Yes, sir.

Q. Handing you what the Reporter has marked Government's Exhibit 5, I will ask you to examine that and state, if you will, what that exihibit consists of?

A. Consists of the entries in the books of the Post Engineer, Fort Omaha, concerning expenditures of the Quartermaster Laundry.

Q. Is that a list compiled under your immediate direction? A. Yes, sir.

Q. Does it correctly reflect those items as shown by the original books and records in the courtroom?

A. Yes, sir.

Q. And are those books and records the official books and records of the Post Engineer at Fort Omaha?

A. They are.

Q. And official government records? A. Yes, sir.

Q. And records upon which you and the entire Post Engineer force rely in conducting the business assigned to them for the government?

[fol. 422] A. Yes, sir.

Mr. Murphy: The Government now offers in evidence Exhibit 5.

Mr. Hotz: In connection with this Exhibit 5, can you tell us from this exhibit which charges have been made on the right-hand column, belonging to the government; that is, installations of the government itself that belong to the United States government?

A. The expenditures on there are kept separately; there is nothing there except expenditures on Quartermaster Laundry.

Mr. Hotz: Q. That isn't the point I am getting at. For instance, here is an item on 7-30-45. Can you tell us from this whether or not that is the government's own property? Is that the government's own property or is that a repair of a part of the Kimball Laundry property?

A. I am not qualified to say that. The documents supporting those entries are on file.

Mr. Hotz: Q. As far as the Quartermaster Corps is concerned, it was charged to the Kimball Laundry Company; that is, the Quartermaster Laundry, which would be the Kimball Laundry Company?

A. The recording, when the costs are prepared, is my obligation. The responsibility for the charges would be [fol. 423] with the post engineer.

Mr. Hotz: Q. You can't tell us which of the charges on here are for the government owned property?

The Court: She has just testified that she made this list from the books that she has kept. That is all there is any occasion to cross-examine her on. The books are here and she hasn't testified to the installation, or anything else. She has testified to what she has done. This is the list, and if it is correct, there is nothing more to say until you get in the books or get somebody who knows what they are talking about.

Mr. Hotz: Q. This list contains, then, everything that went down to the Kimball Laundry Company, both that which was owned by the government or might have sent down there to repair machinery and equipment that belongs to the Kimball Laundry Company?

Mr. Murphy: Objected to as irrelevant and immaterial and not proper cross-examination, and not the best evidence. The document speaks for itself.

The Court: Sustained.

Mr. Hotz: We object to the introduction of Exhibit 5 as not the best evidence, and the witness having stated she cannot make explanation of the items herself; that [fol. 424] she does not have personal knowledge of it.

The Court: Are you contending that the original books from whence this compilation was made are not now at your disposal in the courtroom?

Mr. Hotz: I don't know anything about them, if they are here.

The Court: She has testified that they are. Objection overruled. The document will be received.

Mr. Murphy: I don't know anything about these official records. Does counsel insist she keep them here? I don't want to assume too much responsibility.

The Court: Unless they want to use them this afternoon, I would suggest they be returned to the army authorities and returned here Monday morning.

Q. Will that interfere with your regular work?

A. If I could keep the current ledger.

The Court: You mean for this afternoon?

A. No, I mean Monday morning. It dates only from the 31st day of January, this year, the ledger. I would like to keep the one I need for my work. We have just set up a new ledger and it dates only from the 31st of January, 1946.

The Court: Suppose we ask counsel who has this docu-
[fol. 425] ment to examine it now and determine whether or not there is any reason why it should be brought back.

Mr. Hotz: We can do it now, or at the close of court, and have it done in a very short time.

The Court: We will take our afternoon recess and that will enable you to check these records with it and be prepared to advise the court whether you will want the record back Monday.

Mr. Murphy: If the court please, during recess, parties have conferred and have agreed upon some five items of Government's Exhibit 5, as constituting government-owned equipment. We ask leave, with consent of counsel, to withdraw Government's Exhibit 5 as now in the record and substitute therefor a new copy, eliminating the disputed five items.

Mr. Hotz: As Exhibit 5-A, if the government wishes.

The Court: Do you propose to prepare a new statement and submit it in lieu of this exhibit? Is that what you are asking to do? Is there objection to that?

Mr. Hotz: No, it is agreed.

The Court: It will be allowed.

Mr. Murphy: And that it be received without calling the witness back.

[fol. 426] Mr. Hotz: That is right, and you can take your books.

Government's Exhibit 5-A, found in Volume IV, at Page 1102.

Page 1102. This exhibit from Volume IV, Page 1102.

[fol. 1102] G. EX. 5-A (Received)

QUARTERMASTER LAUNDRY

3/8-43	Castings	101.50
4/20-43	Wiring	81.19
5/13-43	Repair Steam Header	104.00
3/12-43	Repair Boiler	165.45
12/29-43	Plates for boilers	220.22
1/12-44	Repair boiler	317.07
5/15-43	Repair hoist	6.00
5/15-43	Repair Kenny Boiler	990.19
5/15-43	Repair 3 meters	50.00
9/20-43	Repairs to boiler	200.40
7/11-44	Repairs to Kenny boiler	199.22
10/23-44	Repairs small Kenny Boiler	24.50
11/14-44	Repair ash hoist	53.73
11/15-44	Repair Kenny Boiler	435.91
11/29-44	Repair Brine Pump	38.14
12/29-44	Chemically clean 2 Kenny Boilers	1796.06
1/22-45	Repairs to Kenny Boiler	45.10
2/13-45	Repair air pump	591.05
2/7-45	Recondition large Kenny Boiler, new tubes, stay bolts, check seams, etc.	1233.62
3/13-45	Install conduit and wiring 2 and 3 floor	236.35
4/27-45	New floor in elevator	105.75

4/28-45	Repairs to mastic floors 2, 3, 4	7351.88
5/17-45	Repair steps	354.97
7/30-45	Repair motor	44.81
7/30-45	Repair thermometer	56.94
8/31-45	Motor for air compressor	88.40
8/31-45	Repair Thermometer	90.60
10/ -45	Install steam drip line	34.98
10/ -45	Install Kieley or Mueller float valve	152.32
11/ -45	Repair compressor	14.29
11/ -45	Replace waste line, reclaim tank	210.00
11/6-45	Remove concrete floor and replace in basement	457.73
11/26-45	Check Kenny Boiler	6.00
11/26-45	Install steel cover plate as per old coating	19.38
12/26-45	Repair heat radiator	6.50
12/26-45	Furnish labor and materials necessary to install 2 blow-off cocks, repair pipes and misc. plumbing	195.50
12/26-45	Install pressure control	13.00
12/26-45	Repair stoker	3.00
12/26-45	Labor and material to repair elevator	83.55
1/30-46	Repair Kenny Boiler	35.40
1/30-46	Install blow-off basin	155.04
1/30-46	Install air duct	92.00
1/30-46	Repair autocall 5th floor	9.47
1/30-46	Repair Kenny Boiler	175.91

[fol. 427] MR. ERNEST RORICK, produced as a witness on behalf of the *Government*, being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please? A. Ernest Rorick.
Q. Where do you live? A. 3504 Harney.
Q. Here in Omaha, Nebraska? A. Yes, sir.
Q. How long have you lived in Omaha? A. Since 1913.
Q. What is your business or occupation?
A. General contractor.

Q. How long have you been engaged in the business of a general contractor? A. About eighteen years.

Q. Here in Omaha? A. Yes, sir.

Q. Is it part of your work to construct and repair buildings such as the Kimball Laundry building here in Omaha? A. Yes, sir.

Q. Have you, at the request of the army engineer, made a survey of various items of alleged damage to that [fol. 428] building recently? A. I have.

Q. Have you determined the fair and reasonable cost of certain repairs to that building? A. Yes, sir.

Q. Will you detail to us just which particular items of repair you have checked and estimated and determined the fair and reasonable value of?

A. I can read you the proposal on the bid that would probably cover it.

Q. Is the proposal that you refer to the fair and reasonable charge for the particular work? A. Yes, sir.

Q. Yes, then you may take it item by item, if you will please, and tell us what work is involved and the particular charge for that particular item of repair work.

A. The painting is a subcontract from Steinheimer Painting Company.

Q. Let me ask you, for further foundation on that, is Mr. Steinheimer a reputable and well-known painting contractor here in Omaha and has been for many years?

A. Yes.

Q. And customarily does painting as a subcontractor for you under your general contracts?

[fol. 429] A. That is right.

Q. Are you familiar with his work and charges?

A. Yes.

Q. And do you know those are proper charges?

A. He agrees to do the work for that price.

Q. When you say a proposal, have you obtained that in the regular method of doing business as you do in all contracts?

A. Yes, this was compiled with the idea, at the time, of doing the work for that price.

Q. Go ahead and take item by item and tell us what the item consists of and the price for it.

A. Painting building throughout and washing the office woodwork and varnishing it; washing of the ceilings and giving them a coat of paint, except the top floor, which is to be washed; and then the tower on the top floor is to be steel brushed and painted; and the storm sash on the second floor was to be painted; and all glass was to be reputtied and all sash to be painted on the inside.

Q. What do you mean by "sash"?

A. The windows, the steel windows.

Q. All of the steel windows in the building?

A. That is right.

Q. To be cleaned and repainted?

[fol. 430] A. That is right, and reputtied where necessary.

Q. Does that include any replacement of glass, or is that a different item? A. That is a different item.

Q. Is that a complete and first-class paint job, covering the items you have mentioned? A. Yes, sir.

Q. Do you have a separate price or charge for that item of painting?

A. The subcontract on that was $5,997.00.

Q. What is another item?

A. All the toilet doors to be repaired and new hardware to be put on where necessary, and repair accoustic ceiling in the office.

Q. Let me get one at a time, to be sure I get them, please. Again on the toilets, what was that?

A. To repair doors and replace hardware where necessary.

Q. Do you have a separate charge for that, or are there other items together?

A. If you want them separated.

Q. If you have them separated?

A. I have them separated.

Q. Maybe we will simplify our figuring, if, when you get through detailing the work, give us the one total figure for all of it?

[fol. 431] A. Yes.

Q. Let's do that, unless counsel wishes it different.

A. Repair accoustic ceiling in the office.

Q. Tell us in detail what that is.

A. One-foot square accoustic tile that is on the ceiling that has dropped down. The ceiling isn't broke, but it needs to be replaced, to put back up into place.

Q. That is putting that back in first-class condition, is it? A. Yes.

Q. All right, another item?

A. And then terra cotta. There are 28 pieces of terra cotta broken to be replaced.

Q. Where is that terra cotta located?

A. There are two complete sills on the east side of the building on the first floor.

Q. Are those the sills where the windows have been removed and trucks have been backing in?

A. That is right.

Q. And does the job here cover replacing of the terra cotta about there? A. Yes, sir.

Q. And where else?

A. And then in the front of the building there is 28 [fol. 432] pieces, altogether, in different places. There is a sill, I believe, on the third floor, one piece of sill that is out, and then there is a little ornamental piece over the door, and then there is two other pieces on the south side of the building.

Q. Are these on the outside of the building?

A. That is right.

Q. The places around the outside of the building where the terra cotta has been dropping resulted in roping off an area around there, or did you notice that?

A. No, I didn't notice that.

Q. Have you checked the entire outside of the building? A. That is right.

Q. And does this estimate you are detailing here include replacing any damaged terra cotta around there?

A. Well, this includes 28 pieces that I checked that were broken.

Q. Those are the only pieces you found broken?

A. There were a lot of checked pieces, weather checked.

Q. Does terra cotta of that type check, as you use the term, from mere exposure to the elements over a period of years without anything happening to it?

[fol. 433] A. Yes, it seems like this particular terra cotta did.

Q. What is another item?

A. Then, there is six pieces of Bedford stone underneath those windows.

Q. Are those the windows where they removed the windows and had trucks backing in? A. Yes.

Q. And they have a decorative stone around them, or under them, in addition to the terra cotta?

A. That is right.

Q. And that stone has been damaged some?

A. That is right.

Q. And your bid includes not only replacement of the terra cotta with new, but replacement of this damaged stone? A. Yes, new stone.

Q. Same kind of stone? A. Yes, sir, Bedford stone.

Q. All right. Your next item?

A. Six tile on the top floor in the cafeteria that are cracked. It looks like it was due to some settlement.

Q. On which floor did you say? A. Fifth floor.

[fol. 434] Damaged tile on the fifth floor? A. Yes.

Q. Does your bid include replacement of that damaged tile? A. That is right.

Q. And the next item?

A. There is a piece of base out on the same floor over by the water tower.

Q. And your bid includes replacement of that?

A. That is right.

Mr. Hotz: He said it was next to something.

A. The water tower.

Q. The next item? A. That is all.

Q. Is there something there to cover, in connection with the painting, wire brush cleaning and reputtying steel cash? A. Yes, that was in the painting.

Q. And were you to repaint any walls?

A. Yes, two office walls.

Q. In the office, you were to clean them, varnish the woodwork and repaint the two office walls?

A. Those two office walls.

Q. What is the total fair and reasonable charge for completing all of the repairs that you have detailed? [fol. 435] A. $8,389.00.

Q. Are you ready, able and willing to make the repairs you have detailed at the price you have mentioned?

A. Yes, sir.

Q. Is that the type of work you have been engaged in for many years here in Omaha? A. Yes, sir.

Q. And if and when you should do that work, would those repaired parts be placed back in first-class condition? A. Yes, sir.

Q. And am I correct, as I recall your detailing this, where there are damaged parts, they are to be replaced with new parts of the same type? A. Yes, sir.

Q. And that paint job includes everything paintable that has been painted in the building down there?

A. That is right.

Mr. Murphy: You may cross-examine.

Cross-Examination of Ernest Rorick by Mr. Hotz:

Q. Did I understand that the painting work and repairs, the whole business, amounts to $8,339.00?

A. Yes, sir.

Q. Everything, including the painting and the work in connection with the broken parts of the building, is that [fol. 436] right?

A. That is right, the parts that I mentioned, the terra cotta and stone.

Q. How many coats of paint does that mean? A. Two.

Q. When did you make this estimate?

A. Last week, I think it was. This estimate is March 1st.

Q. Did you include in this bid the carrying of workmen's compensation? A. Yes, sir.

Q. Liability? A. Yes, sir.

Q. Performance bond? A. Yes, sir.

Q. Expense incidental thereto? A. What is that?

Q. The premiums on those policies of insurance and indemnity?

A. Yes, we can give you a certificate of insurance.

Q. Is that all included in this price? A. Yes.

Q. How do you spell your name? A. R-o-r-i-c-k.

Q. Where is your office?

[fol. 437] A. 1554 South 20th.

Q. Is that your home or office? A. Office.

Q. The part of the work that is to be done by Mr. Steinheimer as painting was $5997.00? A. That is right.

Q. $5997.00—the difference between $5997.00 and $8339.00 is your estimate of the other work that you spoke about, beginning with the toilet doors and replacing hardware and repairing the ceiling that had dropped down, and terra cotta, and the Bedford stone, and all the other items you spoke of, is that right? A. Yes, sir.

Q. You state in your estimate, in connection with painting, that did not have anything to do with replacement of glass? A. That is right.

Q. In the replacement of glass, is that included in the bill?

A. I have nothing to do with replacement of glass. It is puttying up sash where glass is good and putty is loose, in order to paint it.

Q. Will you please tell us something about the kind of paint you will use? Give us specifications?

[fol. 438] A. It is lead and oil.

Q. And what proportions?

A. I don't know what proportion that would be. All that was called for was lead and oil paint.

Q. Do you know whether or not Mr. Steinheimer would furnish gloss paint for that price for two coats?

A. Gloss wasn't asked for. It was just lead and oil.

Q. Who asked you to make up this list?

A. The engineer.

Q. The army engineer? A. Yes.

Q. What engineer was it you had your dealings with?

Q. What is his name? A. Alexander.

Q. Have you ever had occasion to paint a laundry before, the inside of a laundry?

A. I imagine George Steinheimer has painted as many laundries as anybody else.

Q. You, as a general contractor, are going to supervise it, I imagine? A. Yes, I am.

Q. Did anyone ask you to give your judgment as to what kind of paint should go in there?

A. No, we figured on what was asked for.

[fol. 439] Q. They asked and specified and then you went down and figured and gave your figure?

A. That is right.

Q. In other words, it was a case there of them telling you and not asking?

A. That is the only way we had to arrive at a figure.

Q. The gloss paint, of course, is more expensive?

A. I imagine it would be. It would probably come under enamel rather than white lead and oil.

Q. Did you notice when you went down there that they had used gloss paint before; that gloss paint had been the kind and style used in the laundry?

A. No, I didn't notice.

Q. I think you have omitted the painting on the top floor altogether, didn't you? A. No.

Q. The top floor, the fifth floor? A. No.

Q. How much painting was to be done there?

A. All floors except the ceiling of the top floor and it was to be washed.

Q. Just the ceiling on the top floor? A. Yes.

Q. What about the piping throughout the building?

A. That is to be painted and there is a chute there

[fol. 440] to be painted.

Q. But you can't tell us the kind of paint?

A. White lead and oil.

Q. Just white lead and oil? A. Yes, sir.

Q. Did you get a written specification? A. Yes, sir.

Q. Have you got it? A. I have.

Q. Could we see it? The reason I am asking, Mr. Witness, is because we have another bid from somebody else and might want to give you the job.

A. I would like to sign it now.

Q. This writing is from Steinheimer, but it doesn't give very much. It says, according to plans and instructions prepared by United States Army Engineers.

A. That is right.

Q. But you don't have those with you?

A. No. I have another bid here. We never take just one bid.

Q. Where are the specifications that the army engineers gave you?

A. I don't have them. It was orally. Here is another bid from another painting contractor, practically the same [fol. 441] price; not as well known as Steinheimer.

Q. Not as well known? A. No, sir.

Mr. Hotz: The exhibit that we had in connection with this from the Isard Painting & Decorating Company has never been read to the jury, and this would be a good time, because I want to ask this man a few questions about it.

The Court: Very well. Proceed.

Mr. Hotz: (Reading Kimball Laundry Exhibit 42) "March 6, 1946. Kimball Laundry, 1504 Jones Street, Omaha, Nebraska. Attention: Mr. A. L. Jacobberger. Gentlemen: We agree to do the painting on the exterior and interior of your building located at the above address, as follows:"

You didn't have any painting on the outside.

"Exterior: To thoroughly wire-brush and scrape all loose paint and rust before repainting. To paint all metal doors, steel sash, iron ladders leading to the roof, iron sidewalk door, area grating, iron grilles on alley side, garage doors and all iron work pertaining to the fire

escapes with one coat of metal protective paint. The [fol. 442] four oak front doors to be thoroughly washed, touched up where necessary, sandpapered and given two coats of spar varnish."

Your bid does not cover that.

Mr. Murphy: Just a moment. Objected to as incompetent and immaterial; not being proper cross-examination; there being no evidence in the record that we damaged any of the outside items counsel has just referred to.

The Court: Sustained.

Mr. Hotz: (Reading) "Interior: Sash: All rust on steel window sash and doors leading to the fire escapes to be thoroughly sandpapered to remove same before repainting, touched up with metal primer where necessary and given one coat of metal protective paint."

Mr. Murphy: I ask that the witness be required to comment on each item.

The Court: He has asked the privilege of reading it and then you can go back and ask the witness. Read the document to him.

Mr. Hotz: (Reading) "Wallwork: All work to be painted shall be washed with an approved solution to remove the dirt. All loose or scaley paint to be removed. All ceilings. [fol. 443] walls, columns, pipes, package chutes, conveyor tracks, light brackets and other work down to the dado to be given one coat of pigmented oil-base primer and one coat of semi-gloss enamel. The dado, walls and other work up to the wall color to be given one coat of enamel undercoat and one coat of gloss enamel; colors to be selected. A stripe, color and width to be selected, to be run between the wall color and dado. All doors and trim to be given one coat of enamel undercoat and one coat of gloss enamel. The laundry machinery is not included in this estimate. We agree to complete this work as specified above for the sum of $17,112.50. This estimate includes our furnishing all labor which shall be strictly Union, materials, equipment, supervision, State and Federal taxes, workmen's compensation, public liability, property damage and personal property damage insurance

necessary to complete this work in a first-class manner. We hope this estimate will meet with your approval and that we may be favored with your order for this work at an early date."

Q. Do you have in your possession, or do you have a detailed estimate of the work, such as shown on this Exhibit 42 that I have just read from? Do you have a detailed statement of that type?

[fol. 444] Mr. Murphy: Objected to as incompetent and immaterial and not proper cross-examination, and the letter or exhibit just read by counsel containing various items of which the record here contains no claim whatever of any damage by the government.

The Court: He may, in his cross-examination, show whether or not the estimate he had, or specifications, contained these items. That is as far as he can go in this as pertaining to the exhibit.

Q. In other words, this that I have just read—

The Court: Ask if he had these specific items. You may do that and keep within the order of the court.

Q. You heard this exhibit read, Exhibit 42? A. Yes.

Q. Does your bid include those items? A. It does.

Q. It includes those items? A. Yes, sir.

Q. And the same style and kind of paint? A. No, sir.

Q. It does not include those items?

A. It includes those items painted with white lead and oil.

Q. Yours did not contain anything in connection with the exterior?

[fol. 445] A. Absolutely none.

Q. Addressing myself to you now as the contractor there and not the painter, did it include anything in connection with the sidewalk repairs where the trucks had moved over them and cracked the cement? A. No, sir.

Q. Did it include the repairs to the floors of the shipping room? A. No, sir.

Q. On the first floor? A. No, sir.

Q. Did it include any of this guttering that drains off the water on the various floors?

A. No. It included just the items I read off to you.

Q. Nothing in reference to the elevator? A. No, sir.

Q. Did it include making any repairs to the steel sash in the windows throughout that building?

A. Only to repaint them and to steel-brush them.

Q. I don't suppose you counted the number of windows in that building, did you?

A. They gave us a blue print of it. We had to count the windows to get the area to be painted.

Q. But you don't recall that now?

A. No, I do not recall.

[fol. 446] Q. I think you stated you did not have with you the specifications that were given you by the army engineers so that we could see them?

A. It was oral specifications.

Q. Oral specifications, that is all, but there must have been a blue print? A. Yes, just to get my areas.

Q. Just to get your areas, and that is about all?

A. Yes.

Redirect Examination of Ernest Rorick by Mr. Murphy:

Q. Can you tell us approximately what the additional cost would be if this painting was done as counsel has outlined, with the semi-gloss finish?

A. No. I can get you the figures.

Q. Will you get that for me and let us know Monday morning sometime? A. Yes, sir.

Q. These other items counsel mentioned, the sidewalk and those matters, as far as you know, someone else has been requested to bid on those jobs?

A. That is right. I wasn't asked to bid on those.

Q. Something was said about telling you. The engineers or anyone else, did they ever tell you, or attempt to tell you what prices you should charge for that work? [fol. 447] Mr. Hotz: That isn't what I asked the witness. They told him what they wanted him to figure on. I didn't mean that they told him what figures to put in there. It was the items.

The Court: No one has suggested that you did. He is simply asking the question that you infer refers to you.

Mr. Hotz: Let's have the question read, may I please?

The Court: No.

Q. I want to make certain—I put down one figure and I heard counsel use a slightly different figure. I want to be sure I have the correct total. Will you look at your bid again, eighty-three and some odd dollars? I want to be sure I am right. A. $9389.00.

Mr. Murphy: That is all. (Witness excused.)

[fol. 448] Mr. Robert J. Alexander, produced as a witness on behalf of the *Government*, being first duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please? A. Robert J. Alexander.

Q. Where do you live?

A. 5011 Cumings Street, Omaha, Nebraska.

Q. What is your business or occupation?

A. I am an engineer with the U. S. Engineers, Missouri River Division.

Q. Are you a civilian employee of the army engineers, as we commonly refer to that department? A. I am.

Q. With offices here in Omaha? A. That is correct.

Q. How long have you been stationed here?

A. Since the first of May, 1942.

Q. Continuously since that time? A. Yes, sir.

Q. Have you had occasion to make visits to this Quartermaster Laundry and check the laundry over?

A. I have, sir, yes.

Q. What training have you had as an engineer?

A. I have a Bachelor of Science degree in architectural [fol. 449] engineering from Kansas State College, Manhattan, Kansas.

Q. When did you finish your university work? A. 1933.

Q. And have you been engaged in the civil engineering work since that time?

A. Not in civil engineering work, no, sir.

Q. I used the wrong term. In engineering work?

A. Yes, sir.

Q. And since the last three or more years, here in Omaha? A. Yes, sir.

Q. Are you familiar with the claims, or most of them, as to damage to the Quartermaster building, or the Kimball Laundry building in Omaha?

A. I am generally acquainted with the claims, yes, sir.

Q. Have you personally gone down there and carefully checked the building and made particular note of those items claimed to have been damaged?

A. I have not inspected the building in detail for all items of damage.

Q. But have you those we have been discussing here?

A. The items which have been discussed this afternoon [fol. 450] I have; yes, sir.

Q. Are you familiar with the fair and reasonable cost of repairing those items of damage we have been discussing here this afternoon?

A. I believe I am reasonably familiar with those costs, yes, sir.

Q. Is it a part of your work and training and business to know the proper kind of repairs to make? A. It is.

Q. Did you have something to do with having Mr. Rorick bid on these repairs?

A. It was at my request Mr. Rorick looked over the building and submitted a bid.

Q. Did you in any manner suggest to him what prices he should charge? A. In no way, no, sir.

Q. Did you in any manner limit him as to what he should do other than to call his attention to certain specific items he should check and figure on?

A. I pointed out specifically the items he was to include in his bid.

Q. Did you leave it to him, then, as to what he should charge? A. Yes, sir.

Q. Did you also make a computation of the fair and [fol. 451] reasonable charge for these same items covered by Mr. Rorick?

A. I made an independent government estimate covering the same items; yes, sir.

Q. Does that estimate cover the identical items Mr. Rorick has just testified to in this case? A. It does.

Q. What amount did you arrive at from your own independent computation as the fair and reasonable charge for that same work? A. $9,037.00.

Q. You are a little bit higher than Mr. Rorick's figure?

A. That is correct.

Q. And if that work were done, state whether or not, in your opinion, all of those items therein referred to would be repaired and renovated in a first-class condition? A. In my opinion they would be.

Q. That includes new terra cotta and new Bedford stone; no attempt to patch up or paint or anything of that sort, is that right?

A. It includes new terra cotta where terra cotta has been displaced and fallen away from the building.

Q. And new Bedford stone?

A. And new Bedford stone where those panels have [fol. 452] been damaged.

Q. The same kind of stone that was there before?

A. The same kind of stone that was there, the same ornamentation, surface treatment.

Q. And the steel window frames, steel-brushing, is that a recognized proper manner of cleaning that iron or steel work? A. In my opinion it is.

Q. And when that is done and the paint applied by a competent painter, are they in a first-class condition?

A. If they are steel-brush cleaned and glass reputtied and painted over, I would say they would be, yes.

Q. Did your work also include repainting the offices and varnishing the office furniture? A. What?

Q. Office furniture; varnishing the woodwork?

A. Yes, and repainting of two private offices and cleaning and revarnishing the woodwork in the office portion of the building.

Q. And the painting included painting piping and a shaft of some sort where clothes are sent down and everything of that type?

A. It includes interior painting of all surfaces presently painted.

[fol. 453] Q. Everything Kimball Laundry had painted down there? A. That is correct.

Q. In your opinion, as an engineer, is there any reason why one should use enamel or semi-gloss finish instead of lead and oil paint on this job?

A. In my opinion a lead and oil finish would give a clean, serviceable, sanitary finish in the building.

Q. If you use enamel, is that just more decorative, rather than useful?

A. In my opinion, you use gloss enamel on finely finished woodwork, not on rough brick wall surfaces.

Q. Not on rough wall surfaces? A. Yes, sir.

Q. Where a large part of this painting would be done?

A. The greater part of the painting to be done is exposed brick wall and exposed concrete surfaces, yes, sir.

Q. And iron on steel window frames? A. That is right.

Q. Did you ever see, in any mercantile building, those items painted with a semi-gloss finish?

A. I don't believe I can answer that question. You see all manner of painting, wherever you go.

Q. Assuming, Mr. Alexander, that this paint job down here in this laundry was to be a semi-gloss finish instead [fol. 454] of lead and oil, at least in all parts where that type of finish would be at all appropriate, can you give us any idea how much that would increase the paint cost, or do you have to take some time to figure an estimate?

A. I should take some time. If I might render an offhand opinion, I might say it would add twenty per cent to the paint job. A great part of the cost, if I may interject an opinion, would be in painters' labor, rather than in the type of paint used.

Q. It takes longer to apply it?

A. It takes roughly the same amount of labor regardless of the type of paint used.

Q. Where is the difference? I didn't understand you.

A. The difference is in material cost only, generally speaking.

The Court: Did you observe what area had been painted with this gloss paint to determine that?

A. We did not observe, no, sir, that the building had been previously painted with gloss paint.

Q. What is your opinion as to the type of paint that was used there before, or do you have an opinion?

A. I do not have an opinion on that.

Q. You want to recheck that particular point before [fol. 455] you could answer that?

A. It would have to be checked in detail, yes.

Q. Do you have with you your figure, broken down, to cover the complete paint job on the basis you figured it?

A. Just how do you mean broken down?

Q. Do you have your paint cost separately and segregated from the other items, terra cotta, Bedford stone, and so on? A. Yes, I do have.

Q. What is the estimate of the fair and reasonable value of the entire paint job you have detailed?

A. I will give it to you in two parts, if I may. For cleaning the interior laundry work areas, principally the ceilings and overhead pipes—this is cleaning only—$994.00.

Q. Whether it was painted with lead and oil or semi-gloss, that item would be the same, anyway? A. Yes.

Mr. Hotz: How much?

A. $994.00. For interior painting, including woodwork in offices, removing scale and plaster in stair wells, prior to painting, the painting of steel sash, which are fitted for placement on the east side of the second floor, reputty-[fol. 456]ing steel sash prior to painting, $6100.00.

Q. Did I understand you to say, and without holding you to exact figures, that a fair estimate, if we did the job with a semi-gloss finish, it would add some twenty per cent to that figure?

A. If I were to render now an off-hand opinion, I would say that.

The Court: That is twenty per cent to the material? You have it separate in your estimate, the material from the cost of labor?

A. In this $6100.00, I have not, no, sir. I would add the twenty per cent to the overall figure.

Q. Some $12,000.00 additional? A. Roughly, yes, sir.

Q. Let me put it this way: Your total figure on your basis for the entire job of painting was how much, again, a total figure? A. Including cleaning would be $7,000.00.

Q. No, nine thousand something, wasn't it?

A. My total estimate?

Q. Yes?

A. $9,037.00. Mr. Murphy, may I interject a qualifying statement here?

Q. Yes.

A. In making a government estimate, we arrive at a [fol. 457] sub-total, to which we add a contingency factor of fifteen per cent. That fifteen per cent would have to be added to both the $994.00 for cleaning, and the $6100.00 for interior painting, that I just gave you, to give proper figures to arrive at the overall job total.

Q. Adding that fifteen per cent, what do we have? Is that in the $9,000.00?

A. Yes, the fifteen per cent is in the $9,000.00 total. It is not in the $6100.00 for painting and $994.00 for cleaning. The fifteen per cent is added to a sub-total for the entire estimate before the final total is reached. These are my itemized costs for the specific items of work. I arrive at the sub-total and I add a lump sum of fifteen per cent for contingencies and arrive at the total.

Q. Did you itemize and set down a specific figure for each particular type of work on a definite basis? A. I did.

Q. And to your total, too? A. I did.

Q. What was that total? A. That total was $7858.50.

Q. And then do I understand that you add an arbitrary fifteen per cent?

[fol. 458] A. That is correct.

Q. That is to cover, I think you said, contingencies, possible errors?

A. Possible errors, unpredictable items of work.

Q. Sometimes when you get in a job you have to do more than anticipated?

A. You have to do a little more than can possibly be anticipated.

Q. If I understood you correctly, your figure of $9,037.00 includes a fifteen per cent item that is there just to cover unforeseen contingencies? A. That is correct.

Q. And then if we add to that sum $1200.00 to cover the semi-gloss finishing, additional expense, roughly, at least, we have a total of some $10,237.00, if I am correct?

A. That is correct, but to get it correctly, I would add the fifteen per cent to the $6100.00 before I took the twenty per cent.

Q. In any event, would you say that $10,500.00 would complete the job, including everything you have detailed and semi-gloss paint finish? That is adding another $250.00.

A. Somewhere in the vicinity of that figure would be the figure I would arrive at, yes, sir.

[fol. 459] Q. That would be a complete, first-class job, would it, of all these items you detailed and Mr. Rorick detailed? A. In my opinion, yes.

Q. Let me ask you whether you have also gathered separate costs of some of these other items of damage that have been mentioned here; for instance, sidewalk and flooring—things of that sort? A. Yes, sir, I have.

Q. Do you, or one of the other engineers, have direct charge of those items?

A. I would say they are under the direct charge of another engineer.

Q. And he possibly would be in a better position to tell us as to those details, would he?

A. I can give you the figures on those, if you like.

Q. You might give us those figures.

Mr. Murphy: If the court please, may I withdraw that question, or hold the witness for a moment? May we have a moment to straighten out this exhibit?

The Court: Very well.

Mr. Murphy: May we now have the record show Exhibit 5-A substituted for Exhibit 5, and the original Exhibit 5 withdrawn?

Mr. Hotz: You have made those corrections?
[fol. 460] Mr. Murphy: Yes.

The Court: Gentlemen of the Jury, this is Friday night and we do not try cases on Saturday. I have other engagements and other work besides presiding in the trial of cases here. I am going to excuse you and I am going to adjourn court until ten o'clock Monday morning, and during that time you no doubt will go to your homes and scatter. I want to caution you to be circumspect where you go, who you see, who you associate with. Keep in mind that you are the jury trying this case and officers of this court, charged with all the responsibility that goes with that. Anything you do will reflect on the court and will reflect on each other. Any one of you can disgrace all of us, so it is highly important that you be very circumspect in your conduct. Do not do anything that might work a mistrial in this case. I said to you at the opening of this case that you were to try the case here in the courtroom. You have listened to the witnesses on the witness stand and have examined these papers and have heard the statements of the court and counsel. That is where the case is tried. You must not permit anyone to talk with you about the case when you are not in the court-
[fol. 461] room. If there should be anyone so disposed, you should immediately notify them that you are a juror trying the case, and if they insist, you should immediately report the incident to the Marshal, or the Judge of the court. If you fail to do so, you might be guilty of contempt and be subject to fine, or even imprisonment. There is something else you want to keep in mind. The case is not submitted yet. You must not make up your minds, you must not draw any conclusions as to what your verdict shall be until you have heard all the evidence, and that means you must not talk among yourselves about it. You have no right to confer or undertake to persuade your fellow juror as to anything in the case until you arrive in the jury room. When you arrive in the jury room, after the case has been submitted and you have heard all the evidence and listened to the instructions of

the court and argument of counsel, that is the time to begin your deliberations. You should keep all the facts in mind so that when you get in the jury room you will be able to marshal them, and after considering the facts, then to arrive at a verdict. Keep this in mind, because it is very important. It would reverse this case if it were to appear you were consulting with each other and [fol. 462] discussing the case, or coming to a part agreement before the case is finally submitted. Now then, the wise thing to do is not to talk about it to anyone. Do not even talk about it with the members of your family. You may mention there is such a case, but when you begin to talk about the merits of the case you probably might indicate that you were making up your mind as to what your decision should be before that time arrives. That must not be. Keep these instructions in mind, and let me caution you again that you may not go in the vicinity of this building or this property. Keep away from it. That is not an exhibit in the case. It has been too long since it was taken. If it were taken today or yesterday, we would send you over there with the Marshal and you could look it over for yourself, but three years and seven months is too long a period. Many things have happened since it was taken. For that reason, you must not consider the building, or anything of that kind, except only as it appears from the evidence in the case. With these instructions, you may be excused until ten o'clock Monday morning, and be back promptly at that time and take the chair which you now occupy, when you return.

[fol. 463] March 11, 1946 10:00 A. M.

MR. WILLIAM MOISTER, JR., having been previously produced and duly sworn as a witness on behalf of the *Government*, testified further as follows:

Redirect Examination by Mr. Murphy:

Q. Lieutenant, last Friday you were directed to bring into court the laundry records, and have you this morning, under subpoena, produced and have in the courtroom

some three large boxes of the original official records of the Quartermaster laundry on the matters testified to here Friday? A. I do.

Q. Have you further gone over the lists, Government's Exhibits 2, 3, and 4, and compiled a new and separate list of each of those types of items, eliminating every possible item that pertains to government owned property, or repair to government owned property? A. We have.

Q. Will you please hand me a list so compiled showing payments made for services and repairs to laundry that would correspond with Government's Exhibit 2? Now, I will hand you Government's Exhibit 6 and ask you to compare it with Government's Exhibit 2, and state whether Government's Exhibit 6 is a redraft of Government's Exhibit 2, after eliminating, as you have just stated, all pos- [fol. 464] sible items that might pertain to government owned property in that plant?

A. That is right. Government's Exhibit 6 is Government's Exhibit 2, with all the possible items of repair to government equipment, as closely as we could establish, having been eliminated from that, and as a result we have Exhibit 6.

Q. Will you hand me a similar redraft of replacement parts? I will hand you Government's Exhibit 7 and also Government's Exhibit 3, and ask you to state whether Government's Exhibit 7 is what you have just mentioned, a recompilation of the same list, but eliminating every possible item that might pertain to government owned machinery?

A. That is right. Government's Exhibit 7 is a recompilation of Government's Exhibit 3, eliminating as far as possible any items of repair to government machinery.

Q. Did you likewise recheck, but I believe did not list the items, on Government's Exhibit 4, the expendable items? A. Yes, sir.

Q. And did you, in like manner, eliminate, on your recheck—

Mr. Hotz: I object to that as leading. I have been pretty lenient about it. I am not particular, but I do [fol. 465] object as leading.

The Court: Overruled.

Q. Did you recheck Exhibit 4 and eliminate therefrom all possible items that might have pertained to government owned machinery? A. We did, yes, sir.

Q. And did you compute the total of such items, after eliminating all those possibly pertaining to government owned property? A. Yes, sir.

Q. And what was that total? A. $1,301.95.

Q. And do I understand correctly that is the amount of expendable items of Government's Exhibit 4? A. Yes, sir.

Q. Did you likewise examine the official records in your custody and control and compile an official statement of the maintenance employees furnished by the government in this plant during the period of government occupancy? A. Yes, sir.

Q. May I have that, please? I will hand you Government's Exhibit 8, and ask you to state, without repeating any names or figures, just what that is?

A. A list of maintenance men employed at the Omaha [fol. 466] Quartermaster Laundry, their addresses and dates of employment. It also states from the period September, 1943, through April, 1945, there were three maintenance men on duty. The third paragraph shows the 1945 earnings of two of our maintenance men.

Q. Don't recite the amounts, but that is what it shows?

A. Yes, sir.

Q. Is that Government's Exhibit 8 an official record compiled by you in your position as commanding officer of that plant? A. Yes, sir.

Mr. Murphy: At this time the Government re-offers in evidence Exhibits 2, 3 and 4, and now further offers separately, Exhibits 6, 7 and 8.

Mr. Hotz: I would like to see the exhibits.

Q. I will ask you to examine Government's Exhibit 7, and I note two columns of figures at the right. Will you tell us what those are?

A. The first column is the price per item, and the column to the right is the total, according to the number of units indicated in the left-hand column.

Q. Does this first column of figures in the extreme left of the sheet show the number of items of that particular type?

[fol. 467] A. Yes, sir.

Q. And then the first column of figures to the right is the price per item? A. Yes, sir.

A. And the column to the extreme right is simply the total for the number at the extreme left? A. Yes, sir.

Mr. Hotz: Do you have copies of these exhibits?

The Court: Let us keep the record as we go along. You are asking leave to examine the witness in order to determine whether you wish to object?

Mr. Hotz: Yes.

The Court: Very well, let the record show your application is allowed. Now, ask your questions.

Mr. Hotz: Q. Do you have, Mr. Witness, the copies of these exhibits you have just been referred to in your possession?

A. I have copies of ones, as stated. On the one not tabulated, we have cards and proof on that.

Mr. Hotz: Q. What is that?

A. List of expendable machine parts. That was done in pencil originally.

Mr. Hotz: Q. We will take up Exhibit 2 and the companion exhibit, or new exhibit, or amended Exhibit No. 6. Those two go together, do they not?

[fol. 468] A. What are they?

Mr. Hotz: Q. 2 and 6. A. What are they about?

Mr. Hotz: Q. They are about the payments made for services and repair to laundry and dry cleaning machinery and equipment at Omaha Quartermaster laundry between the dates of December 15, 1942, and December 15, 1945, being Exhibit 2, and then the other one is the same thing. That is Exhibit 6, which is headed the same. Do you have those before you?

A. Payments made for services and repairs, yes, sir.

Mr. Hotz. Q. Without going over each one of these items in Exhibit 2, for example, you start out with Services to repair, clean, oil and adjust the clock $3.20, and

you have the same thing on Exhibit 6. The total of Exhibit 2 is $1569.04, and on Exhibit No. 6, it is $1346.18. What is it did I understand you took out of Exhibit 6, or rather out of Exhibit No. 2 and amended it by Exhibit 6? The difference between them is about—well, whatever the difference between $1569.04 and $1346.18 amounts to, but what I want is to get the idea. What did you eliminate?

A. We tried to eliminate all the payments made for [fol. 469] services that appear to be for government equipment.

Mr. Hotz: For government equipment? A. Yes, sir.

Mr. Hotz: Q. But the items on Exhibit 6, then, are for services that were performed in the upkeep and operation of the laundry during the time the government has had it?

Mr. Murphy: Objected to as not proper cross-examination.

The Court: It is not, Mr. Hotz. You are entitled to go into this and have all this information, but you must not interrupt the flow of the evidence until you get the evidence. If there is any objection to the exhibits as to foundation, or anything of that kind, of course, you should be permitted to inquire in that respect.

Mr. Hotz: Q. Yesterday you testified that you only recently have come to this laundry; that is, you came here last fall; last December or November?

A. Last November.

Mr. Hotz: Q. Last November in 1945? A. Yes, sir.

Mr. Hotz: Q. And these exhibits you have just identified, which are 6, 7 and 8, are taken from the accounting system that was used by the government during this time [fol. 470] down there and as you found it in the files, is that right? A. That is right.

Mr. Hotz: Q. And I presume that the purpose of those files from whence these exhibits were made was to determine the cost of operation, was it not?

A. Just to keep a running—as you do in all government things—you must keep a running account of your expenses if the government is going to pay for them.

Mr. Hotz: Q. And it was done for the purpose of determining the cost of operation to the government of that laundry, is that what these exhibits show?

Mr. Murphy: It is incompetent and immaterial whether they kept it for that purpose or not, or how they were kept.

The Court: It is only a matter of knowing whether they are accurate. The purpose of keeping them might have some bearing on their accuracy, that they are kept under an official duty as official records required by the regulations. It might have greater weight than if they had been kept by a superintendent, and how he was doing it. The objection will be overruled. Do you wish the answer now? I have overruled the objection.

[fol. 471] Mr. Hotz: Yes.

The Court: Let's have it. Question read.

A. I suppose so. That is the purpose behind it. All we do is keep records so that they can be periodically audited. That is the only reason we keep them. What the government uses them for is something that is entirely up to them.

Mr. Hotz: Q. But the exhibits do not propose to show from an accounting standpoint what were the capital expenditures and what were the ordinary repairs and maintenance; so far as you know they are all in one?

A. What were to what?

Mr. Hotz: Q. It might be to determine their capital expenditures; that is, new equipment that was bought and placed in there, or attached to those machines and equipment?

Mr. Murphy: Objected to as not proper examination for the purpose stated, and calling for an expert opinion.

The Court: You are getting back to where you were a while ago. Is there a proper foundation for these exhibits? Are the records in court? Are they the records from which the statement was made? Then, we will pro-

[fol. 472] ceed with the witness on the stand and the government is entitled to direct its own examination and when he has turned the witness over to you, then you can find

out about this. But, in the first instance, they should be disclosed by Mr. Murphy, whose witness he is.

Mr. Hotz: Very well. One more question. Exhibit 8 is a list of maintenance men employed at the Quartermaster Corps, and of course, again, you took that from records, because you don't know? You weren't there?

A. That is right.

Mr. Hotz: Q. Do you have those records here in court?

A. Yes, sir.

Mr. Hotz: And you made up these lists or did somebody else make them up?

A. We were all working together.

Mr. Hotz: Q. But you tried to do a good job, you tried to really arrive at the figures you have on these exhibits, isn't that right? You supervised it yourself?

A. Yes; you said I was trying to really arrive.

Mr. Hotz: Q. You tried to really arrive at those figures as shown by those invoices?

[fol. 473] A. In fact, we had an employee who has been with Kimball Laundry all the time go through these cards and anything there was a question on, anything there was a doubt that it wasn't a repair to a Kimball machine, or anything, we threw out, and that is as close as we come.

Mr. Hotz: Q. That man you had was Mr. McDougal, I suppose? A. No.

Mr. Hotz: Who was it?

A. Mr. Schmidt, one of the foremen.

Mr. Hotz: Q. And Mr. Schmidt's job down there during the operation was what? A. Foreman.

Mr. Hotz: Foreman of what—in the shop, out in the laundry, or in the office? Was he outside in the repair rooms, or in the machine rooms?

A. He was in actual operation of the plant, because he would be better advised than Mr. McDougal to tell on the machinery.

Mr. Hotz: Under the circumstances, we will object to the exhibits not on the grounds they are not the best evidence and that they do not reflect the books and rec-

ords of the operations, but solely upon the grounds that they are a part of an accounting system, only, and unless [fol. 474] the entire accounting system is produced by the government of the operation of that laundry, showing what were the capital expenditures and what were its repairs and maintenance, they are prejudicial to the rights of the respondent laundry and highly prejudicial.

The Court: Objection overruled. Let the record show that in regard to Exhibits 2, 3 and 4, which were offered by the government at the last sitting of the court, and the objection thereto having been taken under advisement on account of the lack of sufficient foundation, the court at this time holds that the foundation is now sufficient and complete; the original documents and records called for, reflected in these summations, or statements, are now in court and available to counsel on the other side; that these Exhibits 2, 3 and 4 will now be received; and in connection therewith, the offer, this morning of Exhibits 6, 7 and 8, as supplemental to these Exhibits 2, 3 and 4, and as corrected statements showing the elimination of items that are not properly involved here, these exhibits will now be received and the objections thereto overruled.

Government's Exhibits 2, 3 and 4, found in Volume IV, at Pages 1099, 1100, and 1101, respectively.

[fol. 1099] G. EX. 2 (Received)

Exhibit 2: Payments made for services and repair to laundry and dry cleaning machinery and equipment at Omaha Quartermaster Laundry, 1502 Jones Street, Omaha 2, Nebraska, from 15 December 1942 to 15 December 1945. The exhibit shows the date and itemization of the items totalling $1,569.04. These items vary from the smallest of 75c to the largest of $85.00.

[fol. 1100] G. EX. 3 (Received)

Exhibit 3: List showing replacement parts laundry and dry cleaning machinery at Omaha Quartermaster

Laundry from December 1942 to December 1945. These items total $5,810.33.

[fol. 1101] G. EX. 4 (Received)

Exhibit 4: List of machinery parts and expendable items in September 1944, totalling $2,985.72.

[fol. 475] Government's Exhibits 6, 7 and 8, found in Volume IV, at Pages 1103, 1104, and 1105, respectively.

[fol. 1103] G. EX. 6 (Received)

Exhibit 6: Payments made for services and repair to Kimball Laundry Company laundry and dry cleaning machinery and equipment at Omaha Quartermaster Laundry from 15 December 1942 to 7 March 1946. These itemizations total $1,346.18.

[fol. 1104] G. EX. 7 (Received)

Exhibit 7: List showing replacement parts of laundry and dry cleaning machinery and equipment from December 1942 to March 1946, consisting of many small items totalling $3,771.72.

[fol. 1105] G. EX. 8 (Received)

1. Following is a list of Maintenance Men employed at the Omaha QM Laundry; their addresses and dates of employ.

Lloyd Loving—6216 Poppleton—WA3648—23 Nov 1942 to Present.

Earl V. Hayes—5323 No 8 St—KE1196—22 Oct 1945 to Present

Harry F. Thompson—1946 So 28 St—HA3995—23 Nov 1942 to 1 Dec 1945

Clarence Prue—508 No 21 St—5 Sept 1945 to 9 Sept 1945

Carl A. Voss—Woodbine, Iowa—1 Sept 1943 to 2 April 1945

2. From period September 1943 through April 1945 there were three maintenance men on duty.

3. Following is yearly salary for above maintenance men as far back as our records go.

	1945	1944	1943
Harry Thompson	$4,431.02		
Lloyd Loving	$3,341.47		

Mr. Murphy: You may cross-examine.

The Court: If it would help you, do you desire some time to study the statements? We will call the Lieutenant back later and permit you to go on and in the meantime your assistants or associate, or clients, can have some time to check these over.

Mr. Hotz: That would be fine, because I haven't seen these exhibits.

The Court: You may be excused, subject to later call on cross-examination.

Mr. Robert J. Alexander, having been produced and duly sworn as a witness on behalf of *the Government*, resumed the witness chair for further

Direct Examination by Mr. Murphy:

Q. As I recall, at the close of our session last Friday afternoon, you were on the stand and had testified regarding certain building repairs covered by the bid of Mr. Rorick. Did you also, in your capacity as an engineer, examine the building in question particularly with respect to some resurfacing of floors, or something of that sort? A. I did.

Q. Tell us just what particular item you checked in that connection?

A. The item checked in that connection consisted of the repair or replacement of approximately 4400 square feet of mastic flooring at the washer lines on the second, third and fourth floors of the building.

Q. Will you describe just briefly the lay of the ground, or perhaps I should say the floors and washing machines and gutters on those floors—just a general picture of what the floor is and how it lays there?

A. The structural floor is flat concrete slabs; under [fol. 477] each washer line there is a depressed slab, or gutter.

Q. You spoke of a washer line. Is that a line where washing machines are set? A. That is correct, yes, sir.

Q. And that gutter, is that a curved out, or depressed place running parallel along those washers and in the concrete?

A. It is a depression in the concrete floor parallel to and under the washer lines and there is a gutter under each washer line.

Q. What is the purpose of those gutters?

A. To receive the drip and spill from the washers in filling and operating and in flushing the washer out.

Q. Is that where all of the wash water ultimately goes out of the wash rooms and down and out of the building?

A. That is correct.

Q. Flows down those gutters? A. Yes.

Q. Is that usually hot or cold water?

A. It is very hot water.

Q. Is it the water that has soap and other material and dirt from the clothing?

[fol. 478] A. Yes.

Q. In other words, it is the wash water after the washing is done? A. That is right.

Q. Is that the same water, by the way, that flows down and around through this heat reclaimer we discussed here last Friday?

A. I would say not. I can't answer that question.

Q. You didn't follow that on down?

A. That is correct.

Q. Did you examine that on all three floors, second, third and fourth? A. I did.

Q. Does that cover all the washing lines in the building? A. To the best of my knowledge it does.

Q. Were those gutters and those floors the original construction when the building was constructed?

A. That is right.

Q. And they have been in use ever since? A. Right.

Q. Originally was there any covering over the concrete floor of the gutters themselves?

A. What do you mean by "originally," Mr. Murphy?

Q. Before the government took possession, let's put it.

A. I did not examine the building at that time. I pre-
[fol. 479] sume that the covering was there, yes, sir.

Q. Anyway, did you examine it with a view to placing a covering over the gutters and the floor along those washer lines? A. I did.

Q. On all three floors? A. On all three floors.

Q. Did you have some 1400 square feet of such flooring? A. That is correct.

Q. You mentioned mastic flooring. What is mastic flooring?

A. A mastic floor is an asphalt surface over a waterproof membrane.

Q. Is that a proper and appropriate floor covering and gutter covering for use as used in this particular building under the circumstances you have described?

A. It would be my opinion it is about the best type of flooring that could be provided in this particular location.

Q. Is it the same type of floor covering that has been down there at various parts of that building, at least for quite some time? A. Yes, sir.

Q. Can you tell that from examining it even now, that there is a lot of mastic flooring in various places
[fol 480] down there that has been there for quite some time?

A. At the washer location there is evidence of previous mastic flooring, yes, sir.

Q. On your computation, did you include a complete covering of all of those gutters and all of that flooring thereabout with this mastic flooring? A. I did.

Q. And if and when such recovering work was done, what would be the condition of those gutters, and placing of this 4400 square feet, over locations you have mentioned?

A. It would be my opinion that the condition of the gutters would be equal to the original construction at the time the building was first built.

Q. Are you familiar with, and is it a part of your business to be familiar with the cost of such material,

the cost of hauling it and delivering it to the building, the cost of laying it, and the labor and all of those things that go into the final cost of the completed job? A. It is.

Q. And did you compute the cost, the reasonable and fair cost of lay ng the 4400 square feet of mastic flooring in the wash rooms, including the gutters on the second, third and fourth floors of this building?

[fol. 481] A. I did.

Q. What in your opinion is the fair and reasonable cost of that work? A. I estimated it at $9800.00.

Q. In your opinion is that the fair and resaonable and proper cost to charge for that work? A. It is.

Q. Did you get any bids on that work, also, aside from your own computations?

A. My estimate was based upon a bid for placing the waterproof membrane and the mastic flooring. The completed job would require some work in addition to that covered by the bid.

Q. And you have included that and added it?

A. Yes, sir.

Q. Did you receive a written or oral bid?

A. Purely an oral bid.

Q. Who from?

A. National Roofing Company of the city of Omaha.

Q. Are they an established company in Omaha engaged in the business of furnishing and laying mastic flooring? A. Correct.

Mr. Murphy: You may cross-examine.

[fol. 482] *Cross-Examination of Robert Alexander by Mr. Hotz:*

Q. When did you come here, Mr. Alexander, to go to work? A. To the city of Omaha?

Q. I mean for the army.

A. I have worked for the army engineers since—

Q. I mean here in Omaha. A. The first of May, 1942.

Q. At that time did you have occasion to make an inspection or go through the Kimball Laundry Company

in order to determine its then condition? A. I did not.

Q. You did not? A. No, sir.

Q. When did you first go down there for the purpose of making these estimates you are now talking about?

A. Within the last month.

Q. In connection with Mr. Rorick's figures, which he gave on the witness stand, he said that you had furnished him with specifications. Were they in writing?

A. They were not.

Q. Did it call for one or two coats of paint?

A. Two coats.

Q. Are you certain about that? A. Yes, sir.

[fol. 483] Q. Did you talk with the painter?

A. No, I did not.

Q. Did you talk with Mr. Steinheimer? A. I did not.

Q. In your operation as a civil engineer, what is your business? That is, just what do you do? Let's have just a brief definition of the duties of a civil engineer.

A. I am not a civil engineer, sir.

Q. What are you? A. An architectural engineer.

Q. You are a civilian employee of the United States army? A. That is correct.

Q. Did you ever have a laundry under your supervision as an architectural engineer for construction or repairs, or anything of that sort, except the Kimball Laundry Company?

A. It has been a part of my duties to review plans and specifications prepared by the army district engineer for the construction of standard laundry buildings at military post camps and stations.

Q. But you never had anything to do with the supervision, the construction of a laundry? A. No, sir.

[fol. 484] Q. I think you stated you had not inspected all of the entire building? Is that what you stated on direct examination? A. That is substantially correct.

Q. Did you receive information from any superior officer, I guess it would be superior officer, in reference to this work, to the extent that you were directed what to determine should be replaced?

A. No, sir, I did not. My inspection was made on my own responsibility.

Q. In the matter of style and kind of paint for the inside of the laundry, did you recognize the fact that in making your conclusions or deductions, that in a laundry it is constantly full of steam and dampness, and whether or not that has any effect on the best style and kind of paint to be put on there?

A. It would simply be my opinion that a lead and oil finish would be satisfactory.

Q. So far as you know, that would be okeh?

A. That is correct.

Q. Have you ever had an opportunity to make a test so that you could give us, from actual experience, what the result is on paint in a laundry room in constant use after an ordinary length of time of lead and oil paint? [fol. 485] A. I have never conducted such a test, no, sir.

Q. From your inspection of that building, would you say, or would you be able to say whether or not the structural defects of that building, from top to bottom, and from one part of it to another, the structural damage to the building was $35,000.00, or less than $35,000.00, or more than $35,000.00, or did you make an inspection that would be big enough or extensive enough so that you could give us such an answer?

Mr. Murphy: Objected to as improper cross-examination, the witness having expressly stated his inspection was limited to certain items. He has not testified to any figures on other items, which are covered by other witnesses.

The Court: He can state it again. You may answer.

Question read. A. No, sir, I did not.

Q. How many feet of guttering would have to be repaired in your estimate?

A. How many lineal feet or square feet?

Q. Lineal feet.

A. I would judge about 600 lineal feet. I trust I am interpreting your question properly.

[fol. 486] Q. Let's get it correct. I don't want to mislead you. What you are talking about are the gutters that drain off the water. About how wide are they?

A. Three to four feet.

Q. How deep are the gutters that drain off the water from the wash rooms into the sewers?

A. About four to six inches deep.

Q. Four to six inches across the top? A. No, deep.

Q. How much across the top?

A. About four feet across the top. Please understand me, I didn't measure them. I am speaking purely from memory.

Q. Your estimate you made to repair those gutters was in reference to the wash rooms, only, was it not?

A. That is correct.

Q. Aren't there other gutters of similar construction in that building?

A. The only gutters which I inspected were in the wash room location.

Q. I mean on other floors than the wash rooms?

A. These are located on the second, third and fourth floors.

Q. You gave a figure, as we have it here, of, I believe, $9800.00, and I want to know whether or not that [fol. 487] included mastic flooring?

A. As I described the mastic flooring to Mr. Murphy it did.

Q. How much of the $9800.00 is mastic flooring and how much of it is guttering?

A. The estimate which I gave Mr. Murphy is based upon a bid from the National Roofing Company. This is a verbal bid, as I qualified it, in the approximate amount of $5830.00, which includes the placement of a four-ply membrane waterproofing of 4400 square feet of surface, including some 2300 lineal feet of gutter corners. I will describe what a gutter corner is if you desire.

Q. Yes, I do.

A. Well, try to picture, if you will, a flat structural concrete slab and then a right angle depression in the

slab to the depth of the gutter and then a right angle turn again in the gutter floor. That cross-section defines two gutter corners. Then, at the ends of the gutter, you have, of course, the same condition, plus the vertical corner formed by the longitudinal and end wall of the gutter. That then comprises the item of 2300 feet of gutter corners. Continuing in my statement, the bid includes 4400 square feet of surface, plus the 2300 lineal [fol. 488] feet of gutter corners, and including the placement of that four-ply waterproofing membrane over that surface and around those gutters, or over those corners, with a one and one-half inch mastic wearing surface on the top of the membrane, waterproofing.

Q. Let me get right there, six hundred and how many lineal feet of that guttering, did you say?

A. Maybe you are confusing between lineal feet of guttering and lineal feet of gutter corners.

Q. As you have stated, the depth of the gutter was from four to six inches, and about four feet across, and if I had lineal feet, it would help me, if you know it. If you don't know it, we will get it from some other source.

A. I had better not give it to you exactly. I would have to compute it off the floor plan.

Q. When you talked with your men to get the estimates, were you as accurate as you are now, or did you have something specific to make an estimate on?

A. I asked the bidder for an item to replace that mastic flooring equally to the condition of the original flooring that was in the building. The National Roofing Company placed that mastic flooring in the original building when it was built in 1925, as I understand.

[fol. 489] Q. And did you know it has already been replaced since the government has been down there?

A. No, sir, I did not know that it was replaced or repaired.

Mr. Murphy: Objected to as not properly reflecting the testimony and not proper cross-examination.

The Court: Sustained. I wonder if we can not clear up this matter of surfacing. As I understand it, part of

these gutters are the same material and same construction, in every respect, as the main surface of these floors? A. That is absolutely correct.

The Court: That the 4400 feet covers all of the base or bottom of the gutters and all the area around it and the surface is all the same? A. That is right.

The Court: Then, there is 2300 feet of these corners and that is a different structure or construction. Tell us about that. Wherein does it differ in material or construction of these corners from the main surface?

A. It does not differ in material. The corners simply occur where you go from a horizontal surface around to a vertical surface, where the floor is depressed to form [fol. 490] the gutter. Here is the flat concrete slab; here is a depression to form the gutter, and here again is the floor of the gutter. In laying this four-ply membrane waterproofing, as I understand it, that is laid over the main floor area in the washer aisles, is turned down over that corner and runs down the vertical side of the gutter, is turned again at the bottom of the gutter in that corner and continues on across the floor of the gutter, and so on, up the other side.

Q. Did you figure any mastic covering for the work room floors or only for the wash room floors?

A. Only for the wash areas.

Q. There is mastic flooring elsewhere in the building?

A. That is correct, but it is a different type of a surface, sir.

Q. You didn't take that into consideration in figuring up your $9800.00?

A. I did not. I was figuring this one specific item of repair, replacement.

Q. You gave a figure of $9800.00 and $5830.00. The difference between $9830.00 and $5830.00 is exactly $4,000.00?

A. Well, it is not quite; approximately $4,000.00.

Q. $9800.00, even, is it?

[fol. 491] A. $9800.00 even, is the figure I gave.

Q. And the mastic flooring is $5830.00?

A. That is right.

Q. What is the difference between the two, approximately $4,000.00, what is that for?

A. There is considerable additional work required to replace this flooring, cleaning off the present floor surface, truing up and squaring up the gutter corners where they may have been damaged.

Q. In the terra cotta—when you were talking about terra cotta—

The Court: We will take our morning recess now.

(Recess)

The Court: You may proceed, Mr. Hotz.

Mr. Hotz: That is all.

The Court: Your last question was with reference to terra cotta.

Mr. Hotz: Yes, that is right.

Q. In connection with the terra cotta, do you have in your estimates, or under your direction to have estimates made, to replace terra cotta other than that which was gone that dropped out of place?

A. No, sir, the figure I gave to Mr. Murphy includes only replacement of terra cotta which has fallen away from the building, or which obviously is in a bad state [fol. 492] of repair.

Q. It didn't include pointing up other terra cotta on the outside of the building?

A. No extra pointing whatever, no, sir.

Q. And did not include steel doors on the areaway and sidewalks on the east side of the building? A. It did not.

Q. Nor the sidewalks? A. No, sir.

Q. But it did include, did it not, the Bedford stone that had been, the slabs on the east side of the building, about six in number or so, do you remember that?

A. It did include the replacement of those stone panels.

Q. Mr. Rorick did state that that was included, but what was the number as you had it in mind?

A. The number to be replaced?

A. Yes.

A. Yes, sir, there are six stone panels there which are apparently damaged.

Q. Was there anything in connection with the brick walls under the windows on the east side of the building on the first floor? A. On the east side of the building? [fol. 493] Q. Yes, the brick wall under the east side of the building on the first floor.

A. Sorry, as I remember it, those stone panels are continuous under the first floor windows.

Q. Was there anything in connection with the smoke stack? A. No, sir, I did not examine the smoke stack.

Q. And the fire escapes, was anything included in your estimates you gave to these contractors in connection with the fire escapes?

Mr. Murphy: If the court please, I don't mean to interrupt, but for the benefit of counsel, we have other witnesses on other items.

Mr. Hotz: Very well. With that explanation, I will cease the cross-examination.

The Court: He hasn't testified to anything about the items you mentioned.

Q. Give us the total of all your figures you did estimate.

A. I gave you the figure of $9037.00, which covers interior painting and certain other miscellaneous items which have been previously detailed; I gave this morning a figure of $9800.00 covering a new mastic flooring in the wash areas.

Q. And that is all? A. That is all.

[fol. 494] Q. That is the sum total of those two, constituting the items which covered all of your testimony, is that right? A. That is correct.

Q. You did, however, make an estimate for Mr. Murphy in connection with an addition of twenty per cent for a different style and kind of paint than that which was put in and explained by Mr. Rorick when he was on the stand?

A. I would hardly qualify it as an estimate. I was asked for an off-hand opinion and I gave it.

Q. And your off-hand opinion was twenty per cent additional? A. Yes.

Q. And that twenty per cent additional increased it by what amount, do you remember?

A. It increased the total, as I recall, roughly from about $9037.00 to around $10,500.00.

Q. In all of these items you have testified to, does it include all labor, or would it be for the Kimball Laundry Company to do some part of that work concerning which you have testified?

A. Covering these items to which I have testified, the figures I have given you would be comparable to contractors' prices to accomplish said work.

[fol. 495] Q. Is there a difference between a gloss finish paint and enamel paint? A. Yes.

Q. What is the difference?

A. There is a semi-gloss wall finish; there is a gloss enamel, which has a high gloss, used generally for finishing finely finished woodwork, wood trim; a common lead and oil paint has a certain amount of gloss to it, although it contains no varnish.

Q. Might I ask the witness to recheck, if you will, please, whether or not, for certain, the estimate which was made for you, or for Mr. Rorick, in connection with this painting, included one coat or two? Will you please do that and then I will ask you the question again after you come back?

A. Will you restate what you want me to do?

Q. I want you to find out whether it is two or one coat of paint included in the estimate you gave. You said it included two coats. A. I did.

Q. Will you check on that? A. I will.

Redirect Examination of Robert Alexander by Mr. Murphy.

Q. I will hand you Government's Exhibit 9, and ask you to state with reference to some red pencil marks on [fol. 496] the first, second and third sheets, whether you entered those red marks thereon? A. I did.

Q. Will you tell us what those red marks show, or indicate?

A. The first, second and third sheets are the second, third and fourth floor plans of the laundry building, respectively. The solid red lines outline the gutters in the washer area. The red cross-hatched lines indicate the outline of the total surface to be refloored with this waterproofing mastic flooring.

Q. Referring to the first sheet, or second floor plan, I note a rather rectangular line with shading just inside of it running around a considerable area, and then, inside of that straight red lines, sort of troughs. Do I correctly understand you, that the first mentioned lines around the outer side of the outer limit of the floor are territory proper, is that correct? A. Correct.

Q. And the straight lines forming sort of troughs are the gutters themselves? A. That is correct.

Q. And did your testimony as to mastic floor covering [fol. 497] include not only the gutters, but all of the other territory within the outer shaded lines? A. It did.

Mr. Murphy: To give counsel a better opportunity, I haven't fully identified the sketch—

The Court: You are not prepared to offer it yet?

Mr. Murphy: I will offer them at this time, but I realize it is subject to some objection. If counsel wishes, I will identify it more in detail later.

The Court: He is going to identify it by another witness.

Mr. E. J. Welch, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please. A. E. J. Welch.

Q. Where do you live? A. 4735 Hickory.

Q. Here in Omaha? A. Yes.

Q. What is your business?

A. Service representative for Otis Elevator Company.

Q. Do you know what type of elevator is installed in the Kimball Laundry building here in Omaha?

A. Yes, sir.

Q. Is that an Otis elevator? A. That is right.

Q. Are you familiar with that elevator? A. Yes, sir.

Q. Have you personally checked it lately? A. Yes.

Q. When? A. A week ago last Monday.

Q. Prior to November 22, 1942, did the Otis Elevator Company have a service contract for servicing that ele-
[fol. 499] vator for Kimball Laundry Company? A. Yes.

Q. After that date, November 22, 1942, state whether or not the Otis Elevator Company continued and had an identical service contract with the army authorities for servicing that elevator? A. Yes.

Q. Has the Otis Elevator Company serviced that elevator constantly since November 22, 1942? A. Yes.

Q. In the same manner they serviced it before for the Kimball Laundry Company? A. Yes, sir.

Q. Does that servicing mean periodic examinations and check-ups of that elevator?

A. Yes, sir, including repair as to the elevator, except the doors.

Q. Have all other repairs needed on that elevator been made during government use and occupancy?

A. That is right.

Q. You mentioned some doors. Did you find some door repairs that should be made? A. That is right.

Q. Is it part of your business to know the cost of such repairs?

[fol. 500] A. I estimated it yes.

Q. What was your estimate of the fair and reasonable cost of the repairs to that elevator at this time?

A. $665.00.

Q. What does that cover?

A. That covers renewing the worn parts on the doors, such as the door guide shoes, the door chains and chains proper, the worn parts from the center door latch, and refastening the anchors to the sills, and furnishing and installing new guide shoes, new door chains and new chains for the doors, repairing the center latches and furnishing new parts, removing the worn sill stops and replacing those, and the worn parts in the door contacts.

Q. Would $665.00 cover that repair work you have outlined? A. Yes, labor and material.

Q. Are those the repairs, which in your opinion, should be made to put that elevator in good, efficient, operating condition at this time?

A. The elevator doors, I would say.

Q. If and when those repairs are made, would that elevator and doors, with these repairs and your regular servicing you have been giving, have that elevator in proper and efficient condition at this time?

[fol. 501] A. That is right.

Q. How long have you been with the Otis Elevator Company? A. Twenty years.

Cross-Examination of E. J. Welch by Mr. Hotz:

Q. There are steel plates in the doors, are there not, of the elevator—steel plates in the doors?

A. The doors are made of steel, yes; steel with sheet metal.

Q. Did your estimated $665.00 contemplate leaving the steel plates in exactly the same shape they are now? Did you notice they were bent in and warped from use, the steel plates in the doors? A. No, I didn't notice that.

Q. How about the cables?

A. The cables are under the maintenance contract and that is an obligation of the Otis Elevator to replace those.

Q. Do you have any personal knowledge whether anything was done to the cables during the period of operation? I mean, personally. You assume that it was, but do you know personally whether anything was done to the cables by way of repair?

A. I don't know offhand which ones were replaced. I can't say offhand.

[fol. 502] Q. Would there be a record of that with the Otis Elevator Company? A. Yes.

Q. Do you know whether or not the same kind of contract was entered into or continued with the quartermaster corps in reference to that elevator, exactly the

same kind of contract it had with the Kimball Laundry Company? A. Its maintenance, yes.

Q. Does it include replacements of broken parts or anything of that sort?

A. On the elevator proper, yes, with the exception of the doors.

Q. What about the elevator floor, the floor in the elevator itself? A. The wood floor?

Q. Yes. A. Yes.

Q. Is that included? A. In the maintenance?

Q. That is part of your contract? A. That is right.

Q. Have you looked at the floor to see whether or not it needs fixing?

A. No, I didn't. They had some trucks on it and I [fol. 503] didn't pay particular attention.

Q. Did you see that elevator in 1942? Did you have a chance to take a look at it in 1942, just before the government took it over?

A. A little previous to that time, as I recall.

Q. You have had a chance, you stated, to look at it now in the last week or so, making these estimations, is that right? A. Yes, sir, that is right.

Q. Would you say $665.00 would place that elevator, as you saw it now, in the same condition, or as good a condition now as it was in 1942?

A. They merely replace the present worn parts.

Q. And, of course, there has been obvious use of the elevator by the army during all this time, three and one-half years? A. Yes, sir.

Q. There is such a thing as obsolescence with even an Otis elevator? A. Yes.

Q. What would you say it had depreciated in value from the time in 1942, as you knew that elevator then, as kept up by the Kimball Laundry Company, and as you found it at this time, in 1946?

Mr. Murphy: Objected to as not proper cross-exam- [fol. 504] ination; not a matter gone into with this witness; a matter of rebuttal if he wishes to call him as his own witness.

The Court: Sustained. Witness excused.

MR. A. J. PARGETT, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please. A. A. J. Pargett.

Q. Where do you live? A. I live in Omaha.

Q. How long have you lived here?

A. Approximately four years.

Q. Where are you employed?

A. U. S. Engineers, Missouri River Division.

Q. Have you been so employed during this past four years while you have been in Omaha? A. Yes, sir.

Q. In what line of work or occupation are you employed? A. As a construction engineer.

Q. You are a construction engineer? A. Yes, sir.

Q. What schooling have you had in that line of work?

A. I have attended Kansas State College and technical schools.

Q. How long have you been engaged in working as such an engineer? A. About six or seven years.

[fol. 506] Q. Is it part of your work and training to familiarize yourself with construction costs and repair costs and needs in connection with buildings and items of that sort? A. Yes, sir.

Q. That is your business? A. Yes, sir.

Q. And you have been doing that type of work for the past five or six years with the army engineers?

A. Yes, sir.

Q. Have you examined certain parts of the quartermaster laundry, or formerly Kimball Laundry Company building, 15th and Jones Streets, here in Omaha?

A. I have, sir.

Q. When did you make that examination, or those examinations, whatever the case may be?

A. Well, it has been over a period of beginning about the 15th of December up until about the 5th of March of this year.

Q. The 15th of last December up until the 5th of this month? A. Yes, sir.

Q. Did you make various visits to that building and examine, check and survey certain parts of it during that period of time?

[fol. 507] A. I did.

Q. And did you note certain items of repair and compute the reasonable cost of repairs to certain items?

A. Yes, sir, I did.

Q. And doing that, did you also inquire of local contractors, men, or companies in the business of making the same type of repairs? A. Yes, sir.

Q. I will ask you specifically about an item of resurfacing and repairing some flooring. Did you check that particular item? A. Yes, sir.

Q. How much flooring and where located?

A. It is located on the second, third and fourth floors of the Kimball Laundry.

Q. Do you remember how many square feet of such floor repairs you figured?

A. Approximately a thousand square feet of this flooring to be repaired and a thousand square feet to be resurfaced.

Q. A total of two thousand square feet of floor space?

A. Yes, sir.

Q. What kind of flooring?

A. It is a sort of mastic flooring.

Q. Is it the same type of flooring they have had in [fol. 508] that particular area in the past?

A. It is the same type of flooring that exists in the building at the present time.

Q. And if and when such reflooring were laid, what would the condition of such floor be?

A. I estimate it would be in good condition.

Q. Would it be a complete, finished floor, perfectly smooth and level? A. Yes.

Q. Is that material a proper and appropriate material for the floor in that particular building?

A. According to the contractors it is. I am not too familiar with what is required.

Q. Is it a common type of flooring in buildings of that sort? A. Yes, sir.

Q. And how much did you find to be the fair and reasonable cost of the floor repairs you have just mentioned? A. $987.00.

Q. There has been some talk about some sidewalk. Did you examine that? A. Yes, sir.

Q. Where is that located?

A. That is on the east side on 15th Street.

[fol. 509] Q. Is that where the trucks backed over the sidewalk? A. That is right, sir.

Q. The sidewalk is pretty badly damaged there?

A. It is cracked and broken.

Q. Did you check that and examine it with a view of determining the reasonable cost of relaying sidewalk wherever it is broken? A. I did, sir.

Q. What in your opinion is the fair and reasonable cost of replacing the broken sidewalk, or did you include something additional in there?

A. Yes, sir, I included some additional work.

Q. Where is that additional work?

A. In the first floor delivery and receiving room of the Kimball Laundry.

Q. So, you found not only the sidewalk, but some inside place which hasn't been mentioned here before which in your opinion should be repaired?

A. Yes, sir, the cracks in the floor need some maintenance and they should be cleaned and hot mastic put in those cracks and then a sealer applied to the floor surface.

Q. Have you included all of that in your estimate of that work? A. Yes.

[fol. 510] Q. Including that, what is your opinion as to what the fair and reasonable cost of that work would be? A. $256.65.

Q. If that work were done, would that sidewalk and that inside part be in first-class condition? A. Yes, sir.

Q. The sidewalk would be practically a new sidewalk, I assume?

A. Removing the old concrete sidewalk and replacing it with a new concrete sidewalk.

Q. Then, there has been some testimony about some broken window panes. Did you find there were some broken window panes in that building? A. Yes, sir.

Q. Have you checked them and determined the fair and reasonable cost of replacing the broken and cracked window panes in that building? A. I did, sir.

Q. That means replacing them there in the building, not just buying the glass and leaving them outside?

A. No, sir, that is installed and in place.

Q. What in your opinion is the fair and reasonable cost of that item? A. $183.78.

Q. There has been some talk of some damage to some [fol. 511] fire doors. Did you check that item?

A. Yes, sir.

Q. Do you recall what the situation is there?

A. Some of the doors are rusted pretty badly.

Q. Can you determine whether that rust all accumulated in the last three and one-half years, or whether it is over a longer period of time?

A. I estimate the life of these doors, under these conditions, would be about eight to ten years.

Q. That is a normal life, anyway? A. Yes, sir.

Q. Have you figured replacement of some of those doors? A. Yes, sir.

Q. Irrespective of how long the deterioration has covered? A. That is right.

Q. Replacing with new doors? A. Yes, sir.

Q. Was there some repair work to be done there?

A. The replacing the doors was the only thing I estimated.

Q. What in your opinion is the fair and reasonable cost of replacing these fire doors with new fire doors?

A. That would be $255.65.

[fol. 512] Q. Does that include labor and the complete job? A. That is right.

Q. How many doors does that include, do you recall?

A. That was three doors.

Q. There was another item, terazzo flooring on the fifth floor. Did you check that? A. Yes, sir.

Q. Did you find some damage to that flooring?

A. Minor damage, yes, sir.

Q. Can you determine whether that damage occurred over the last three and one-half years, or whether, in all probability, it has been a gradual, growing condition over a period of several years?

A. I couldn't determine whether it had been done within the last three and one-half years, or whether it had been done over a period of years.

Q. Whichever way it was done, did you estimate the fair and reasonable cost of repairing it in full, however and whenever it occurred? A. Yes, sir.

Q. What kind of repair work did you have in mind?

A. Replacing the damaged portion to the same floor as it existed at the present time and then resurfacing it.

Q. How do you resurface it?

[fol. 513] A. They have a grinding machine that they grind the surface of this floor.

Q. This terrazzo flooring, as I have seen it, is a hard, polished, finished floor? A. That is right, sir.

Q. Kind of a vari-colored stone appearance when it is finished?

A. It is a marble imbedded in the cement.

Q. And you would replace wherever there is any missing or damaged or chipped, with new flooring?

A. Yes, sir.

Q. And then polish it down to the same hard finish?

A. That is right, sir.

Q. Would that leave any marks?

A. Well, there may be some evidence of a crack or where the two parts are brought together. It is difficult to overcome that.

Q. Would that be a crack or a hair line?

A. A hair line.

Q. Where is that damaged condition down there?

A. The damaged condition is the joining of the metal strips that they put in these terrazzo floors, the brass

metal strips, and this damage to this floor is adjoining those, right adjacent to them.

Q. That is, as originally laid, this flooring was cut [fol. 514] into large squares? A. Yes, sir.

Q. With a metal strip laid in there, originally, around each of those squares? A. That is right, sir.

Q. And the chipping is right along where there was a break or crack in the floor, originally, with the metal strip in there? A. Yes, sir.

Q. And your work is refilling that and repolishing it down to a smooth finish in an entirely filled condition?

A. Yes, sir.

Q. That is on the fifth floor?

A. That is on the fifth floor.

Q. Is there any damage to that terrazzo flooring down there except along those original breaks or cracks?

A. No, sir.

Q. It is still smooth and solid and hard today? A. Yes.

Q. When this is done, it will be that way all over?

A. All over, yes, sir.

Q. What in your opinion is the fair and reasonable cost of the repair to the floor that you have just mentioned?

[fol. 515] A. $194.00.

Q. Did you also fortify yourself with a bid on that particular work?

A. I went down to the laundry with the man who originally put in that floor.

Q. Is that the man who figured with you on this estimate? A. Yes.

Q. Does this figure include work by the same man who put the original floor in? A. Yes, sir.

Q. Who is that, by the way? A. Mr. Macchietto.

Q. He is a man here in Omaha who has been laying these terrazzo floors some years? A. Yes, sir.

Q. Did you check an item of some emergency room down there? I don't know just what that is.

A. The emergency room was sort of a hospital room set up by the government to take care of anyone who was

injured or ill in the laundry and in this room they have two beds, and an office, and facilities for taking care of anyone who was injured or ill, and they had a nurse on duty there.

Q. Is that room on the fifth floor?

[fol. 516] A. Yes, sir.

Q. Adjoining the dining room and kitchen up there?

A. It is just east of the lunch room.

Q. Did that involve putting in some temporary partitions? A. Yes, sir.

Q. Did you make an estimate of the fair and reasonable cost of removing any changes that were made there and putting that particular place in its original condition? A. Yes, sir.

Q. What was the reasonable cost of this item?

A. $45.00.

Q. In your opinion, and in so far as any of these particular items you have testified about are concerned, if and when these repairs that you have outlined have been made at the cost you have given, would those items be completely repaired and be restored to first-class condition? A. That is right, sir.

Q. Do you recall any other items that you handled particularly that I have omitted or have I covered it pretty well?

A. There is one item you have omitted and that is the repair of the toilet on the second floor.

Q. Oh, yes. Tell us about that, please.

[fol. 517] The government needed additional toilet facilities on the second floor, a men's toilet, so they moved a lavatory over and installed a water closet and this water closet will have to be removed, the hole or sewer plugged up and the lavatory moved back into its original position and the wall fixed.

Q. So as to restore that particular item to its original condition? A. Yes, sir.

Q. What is the fair and reasonable cost of that particular job? A. $25.00.

Q. And if that work is done at that cost, would those items then be back in their original condition? A. Yes, sir.

Q. And in first-class condition? A. Yes, sir.

Q. Any other item I have overlooked? A. No, sir.

Mr. Murphy: At this time I would like permission to call a short witness interposing between Mr. Pargett's direct and cross-examination.

The Court: Permission granted.

[fol. 518] Mr. L. J. Osterholm, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please. A. L. J. Osterholm.

Q. Do you live here in Omaha? A. Yes.

Q. What is your business?

A. I operate a welding business.

Q. What welding business do you operate?

A. It is known as Economy Welding Service.

Q. How long have you been engaged in that service?

A. I have been there fourteen years.

Q. Have you recently examined the hot water tank on the top or fifth floor of the Kimball Laundry building here in Omaha? A. I have.

Q. And did you do that personally? A. I did.

Q. And did you check and examine its condition?

A. Yes, sir.

Q. What did you find its condition to be?

A. It has had a vacuum pulled on it and the lining has been distorted, pulled away from the outer envelope, [fol. 519] cracking this copper lining in many places and distorting it, and also flooding it on the outside between the two tanks, rendering it unfit for service in its present condition.

Q. Did you examine it with a view to proper repair to that tank? A. I did.

Q. Can you make the proper repair to that tank, correcting that present condition? A. Yes, sir, we can.

Q. Is that a welding job? A. That is a welding job.

Q. And if and when that is done, then does that leave the original copper coils in that tank, or copper whatever it is?

A. Copper lining—the original copper lining will be in that tank. It will be reconditioned.

Q. And in solid form? A. Yes, sir.

Q. And if and when that is done, will that hot water tank be a good and efficient operating tank? A. I believe it will.

Q. What in your opinion would be the fair and reasonable cost for that repair?

A. I figured the repairs and testing to run $600.00.

[fol. 520] Q. You mentioned two items. What would the repair amount to?

A. Welding of seams will run $300.00.

Q. And then the testing would run an additional $300.00? A. The dehydration of the tank will run $300.00.

Q. Is that an extra-precautionary check, an examining to be sure everything is in order? Is that what you mean by testing, or what do you mean by it?

A. To start with, in the dehydration of the tank, it is necessary to remove all moisture from between the two walls. This copper lining, as I say, has collapsed and it has developed leaks and there is water between the lining and the outer envelop that must be removed. With removal of that, we can proceed with the other repair work necessary, the relocation of the lining and the rewelding of all seams. Upon the completion of that, the testing comes in. We have got to pierce the outer envelop, install fittings, put a nominal pressure between the two vessels and thoroughly test all of the seams in the entire outside surface of the tank.

Q. To make sure they are all tight and in proper shape? A. Right.

Q. You estimate $600.00 covers it entirely, complete and there in the building?

[fol. 521] A. Yes, sir.

Q. Can you determine whether there has been any particular damage to that tank during the last three and one-half years, or thereabouts, or whether this present condition is the result of the normal age of that tank?

A. So far as the copper lining is concerned, I would say the metal was in as good condition as it was when it was new. There would be no deterioration in the copper. The steel envelop, I can't tell you. That will deteriorate from the day it is put into service until finally it goes out of service.

Q. There isn't anything particularly unusual about the condition of that tank down there, in view of the fact it has been there since about in 1924 or 1925?

A. I would think not.

Q. Have you had occasion to repair this same tank at some past time? A. Yes, in 1937.

Q. Who did you repair it for then?

A. Kimball Laundry Company.

Q. Was it in need of repairs at that time?

A. At that time it was in very much of a similar condition to which it is now. It is possibly a little bit worse now than it was then.

[fol. 522] Q. And you repaired it in 1937, then, for Kimball Laundry? A. Yes.

Q. And then, in due course of time, it has again reached that similar condition; perhaps a little more pronounced? A. Right.

Mr. Murphy: You may cross-examine.

Cross-Examination of L. J. Osterholm by Mr. Hotz:

Q. You say the condition of that water tank—and that is what it is, isn't it? A. That is right.

Q. Was due to a vacuum that was pulled. Just tell us what you mean by that.

A. There is a low pressure generated within this tank in the operation, or in the manipulation of control valves, which, if not relieved, will cause this lining to collapse and crack in the various seams in it. There are any number of things that can cause it.

Q. Do you know whether that explanation is what caused it to be in the condition that it now is?

A. It is the only thing that can cause it.

Q. Where is that controlled? Where is that pressure controlled? In what part of the building and in what [fol. 523] machine? A. That I can not say.

Q. How big a piece of machinery is it?

A. This tank is, oh, probably eighteen feet long and six or seven feet, possibly even eight feet in diameter. It is quite a large vessel.

Q. What is inside of it—water, of course—but—

A. Water, and then it is a water heating tank, a tempering tank.

Q. There are coils in there? A. Yes.

Q. Eighteen feet, but how wide is it?

A. Possibly seven feet.

Q. It is a big thing?

A. It is an immense tank. It is a big tank.

Q. And then it is covered over by a shed, is it not?

A. Yes, it is in a separate room of some sort.

Q. On top of the building?

A. Yes, in the building. I don't know whether it is the top or not.

Q. Do you know how much damage has been done to the outer shell by the soft water coming in contact with the steel outside of the shell?

A. That I could only guess at.

Q. We want to get at the facts, is all. What kind of [fol. 524] job did you do on it in 1937? Is your recollection pretty good on that? Did you do the job yourself, or did some of your men do it?

A. Some of my men in 1937. The inner liner had been collapsed from a vacuum being pulled on it and it was in much the same condition that it is now as far as distortion of the lining and apparent leaks.

Q. Did you have to do any welding of the copper?

A. It is the copper that has to be welded.

Q. What will it be welded with?

A. With copper or with bronze, a neutral metal in water.

Q. What are you going to put in, copper or bronze, or a neutral metal?

A. We will do it with whichever of the metals is most readily available at the time.

Q. What did you repair it with in 1937? With copper? A. With bronze.

Q. Did you make a personal examination of the coils and in the shell to see whether or not there was any pitting? A. In back of the liner?

Q. Yes.

A. No, sir. While it is out of position, there are no cracks opened up sufficient to pry this liner away to [fol. 525] examine the outer shell.

Q. But there was leakage and moisture into that outer shell? A. There is leakage, very definitely.

Q. But you didn't examine it close enough to know what damage had been done, if any?

A. It is impossible to examine it without a removal of at least a section of the copper.

Q. Without opening it up to see whether or not it needs replacement or repairs in that regard, is that right? A. That is right.

Q. You spell your name O-s-t-e-r-h-o-l-m? A. Yes.

Q. Your place is up on Cumings?

A. At 18th and Cumings.

Q. Have you been there for a long time? A. Yes.

Redirect Examination of L. J. Osterholm by Mr. Murphy:

Q. Did you let any water out of this place Mr. Hotz has been asking you about, water that had contact with this outer shell?

A. Yes, we discovered what was apparently a little blister, a deposit of scale. We tapped that with a hammer and struck oil—struck water.

Q. When this water came out of there, what was the [fol. 526] condition of that water? A. It was clear.

Q. Would that indicate anything to you as to whether there was any rust accumulated inside there?

A. It would indicate merely that the water was low in sediment, the tank is quiet, there isn't any reason to

believe that it would pick up its sediment within the jacket. If there is any, I would think any rust content would be of a small nature, from the appearance of the stream.

Q. Am I correct in my layman's guess, if there was any noticeable amount of rust in there, it would show up some in the coloration of the water?

A. Your iron oxides are heavy. They will sink.

Recross-Examination of L. J. Osterholm by Mr. Hotz:

Q. I want you to explain how thick the wall of that tank is? About how thick is it?

The Court: You mean the shell?

A. The shell of the tank is probably a half an inch plate. However, that is subject to correction. I didn't measure it. I was, at the time, concerned only with the liner.

Q. What is next to that? Is that the plate that is on the inside of the tank?

A. That is the external plate of steel. The liner is [fol. 527] inside of it. That is the envelop which gives it its strength. It is its supporting area.

Q. What is inside that envelop?

A. Inside is a liner of sheet copper, which is in close proximity to this steel tank.

Q. When the water goes up into that tank what becomes of it? (Answer) It goes to the fill point and steam is instilled in these coils.

Q. Condensed?

A. To temper the water for use in the laundry process.

Q. Again? For use again?

A. I don't know that it is for use again.

Q. What is the purpose of sending the water up there on the roof into this tank?

A. To temper the water for laundry purposes and to gravity it and to return it, to gravity it into the various laundry machines where it is used.

Q. Back down again into the building? A. Yes.

Q. Did you make any examination of any of the connecting pipes? A. Not at all.

Q. From the tank, throughout the building, up and down? A. No, sir.

[fol. 528] MR. A. J. PARGETT, having been previously produced and duly sworn as a witness on behalf of the *Government*, resumed the stand for

Cross-Examination by Mr. Hotz:

Q. In making your estimate, did you obtain any written contract or written proposal signed by any contractors? A. Yes, sir.

Q. Do you have those? A. Yes, sir.

Q. They are available? A. Yes, sir.

Q. And are they detailed? A. In some instances they are.

Q. Can you obtain them for us for our inspection, if we want them? A. Yes, sir.

Q. Your business is an engineer—what kind of an engineer? A. Construction engineer.

Q. Construction engineer? A. Yes, sir.

Q. In that regard, you differ from Mr. Alexander—he is an architectural engineer, is that right?

A. I think that is right, sir.

Q. Do you work under him?

[fol. 529] A. Yes, sir.

Q. Were you advised, or were you told, or did you make any examination of the changes that would be required in the removal of any of the machinery; that is, the flat work machines and ironers from the fourth floor to the second floor, and the shirt ironers, seven of them—two in the first instance, two machines, and then seven machines from the second to the third floor? In other words, in making your estimate, did you include any repairs to the floors incident to removing any machines, or did you make your estimates upon the machines just as they stood where they now are in the building and as you found them?

Mr. Murphy: Objected to as not proper cross-examination, the witness not having testified to what they would remove in the way of machines, having expressly limited

his testimony to specific items mentioned and not covering that.

Mr. Hotz: Understand, I didn't ask for any expense in connection with removal. I am asking about whether or not, in the repairs to these cement floors he took into consideration the condition of the floors in the event of removal of machinery, or whether he made his estimates [fol. 530] with the machines now in place?

The Court: He has testified to what repairs he thought were necessary at this time, or when he examined it, to put the floors back in first-class condition. You are anticipating some contingency that may or may not occur.

Mr. Hotz: No, it is not a contingency that may or may not be—

The Court: Do you have in mind some machines on these floors that may have to be removed and the floors taken out?

Mr. Hotz: Certainly.

The Court: Isn't that a separate item of damage?

Mr. Hotz: What was done—for instance, the flat work ironers—the Government wanted them on a different floor than they were when they went in there, so they moved them to another floor, and they did that with seven of one type of machines, and two of another type of machines, and then a third one would be in connection with government machines themselves, and I want to know something about it so I can rebut it.

The Court: Proceed.

Q. What I want to know is whether or not your estimate in connection with this work was based upon the [fol. 531] machines as they now are in place down in that plant; that is, the floor? A. On the floor?

Q. Yes.

A. This estimate was based on some of the machines being moved.

Q. You did take some of that into consideration?

A. Yes, sir.

Q. Which ones?

A. For instance, some of those Zarmo presses.

Q. How many of them?

A. Well, I just don't remember the exact number, but the government machines, some of them have been removed now and some of them I anticipate will be removed, and we are taking that into consideration in making this estimate.

Q. That is rather general. You say Zarmo ironers. I suppose you mean the flat work ironers? A. Yes, sir.

Q. And there were two of those that were moved up to the fourth floor—they are to be moved back to the second floor at the Kimball Laundry Company where they were. Did you take that into consideration?

A. As I remember, there were not two of the flat [fol. 532] work ironers moved to the fourth floor; there was only one of the four-roll flat work ironers moved to the fourth floor from the second floor; and that was taken into consideration.

Q. What about the shirt units for ironing shirts?

A. Those government shirt units?

Q. No, they belong to the Kimball Laundry Company, to be moved from the second to the third floor. I am trying to help you out so we won't get you into complications. I am not trying to do anything else than that. I want to know, because your estimate might be the same as ours, but I can't tell unless you tell me what you took into consideration.

A. No, sir, those weren't taken into consideration.

Q. Do you know which machines down there actually belong to the government that have to be removed? You say they are being removed, and will you tell us a little about that? A. Yes, sir.

Q. Go ahead. A. On the second floor, sir?

Q. I don't know. Throughout the building?

Mr. Murphy: Just a moment. Objected to as not proper cross-examination. May I state that I have no desire to [fol. 533] limit counsel, but we have another witness on the removal and replacement of all individual items of machinery down there.

The Court: The mere question was whether or not the witness took into consideration these items in connection with his testimony. That is proper cross-examination.

Q. The damage to the floor, that is what I want to know. A. If the government machines are removed—

The Court: Did you take that into consideration?

Q. Have you already taken it into consideration?

A. It has been taken into consideration on the removal of the machines.

Q. In these estimates that you have already given in dollars and cents that you gave to Mr. Murphy, to be more specific? A. Not on the government items.

Mr. Hotz: I didn't think so.

Q. You gave $897.00, is that right?

A. That is right, sir.

Q. The sidewalks—we will go into the question of the sidewalks—replacing sidewalks. Did that include both Jones and 15th Street sidewalks? A. No, sir.

Q. Which ones?

[fol. 534] A. 15th Street.

Q. Just 15th Street? A. Yes, sir.

Q. How many square feet of concrete would you estimate for the $256.65?

A. About 450 square feet of sidewalk.

Q. What thickness? Is that three or four or five inch?

A. It would be four-inch, about.

Q. Did your estimate include the preparation of the under-surface; that is, the taking out of the concrete that is broken and preparing the surface and putting in the proper foundation? A. Yes, sir.

Q. And the labor incident thereto? A. Yes, sir.

Q. Do you have a written contract on that? A. No, sir.

Q. And it does not include Jones Street? A. No, sir.

Q. Jones Street is on the south side of the building?

A. Yes, sir.

Q. I think you stated that the concrete in the shipping room floor was included in your estimate, or am I mistaken? A. That is right.

[fol. 535] Q. You did include it?

A. That included the repair of the concrete floor in the shipping and receiving room floor.

Q. The shipping room floor, you come into that

through a great big door on the alley corner on the northeast corner of the building, isn't that right?

A. I would rather call it the east side of the building.

Q. Well, the east side, yes, and through that door trucks may back in, is that right?

A. I think that is right.

Q. And that is called the receiving room? A. Yes, sir.

Q. And the purpose of, so far as you could see there, was for the purpose of taking in laundry and whatever else was needed, and taking it out again, whatever was needed, is that right? A. That is right.

Q. And the floor was cement, is that right?

A. Yes, sir, it is still cement.

Q. You found some necessary repairs to that floor, is that right? A. That is right.

Q. And you took that into consideration along also with your $256.65, is that right?

[fol. 536] A. Yes, sir.

Q. In making the repair to that floor, how did you propose to do it?

A. Well, it was to repair the joints and the cracks that have formed in that floor, they should be swept and blown out with air and a hot asphalt poured into those cracks to seal them up.

Q. Your idea was to pour asphalt into the cracked cement? A. It is a composition, an asphalt composition.

Q. I understand it is a composition used for the purpose of fixing cracks and that is the extent that you had in mind for the repairs to that floor in the shipping room, is that right?

A. And then there is to be a coat of sealer applied to the floor.

Q. A coat of sealer? A. Yes, sir.

Q. That means what?

A. That is a compound that is manufactured to apply to concrete floors. It is absorbed by the concrete floor and makes the concrete hard and easier to keep clean. It is a sealer that is applied on the surface.

Q. What are the dimensions of that shipping room?

A. Approximately four thousand square feet.

[fol. 537] Q. That is all included in the $256.65?

A. Yes, sir.

Q. Do you have a contract on that? A. No, sir.

Q. Did the window panes you talked about being installed for $193.78, include the cracked panes or those that were out?

A. They included broken and cracked windows.

Q. If a window had a crack in it you considered that that was necessary to replace? A. Yes, sir.

Q. And that was included in the $193.78? A. Yes.

Q. And that was throughout the whole building?

A. That was throughout the whole building.

Q. I don't suppose you could give us the number of panes there were? A. In the vicinity of about 200.

Q. About 200 panes of glass? A. Yes.

Q. Did that include preparation of the window frame; that is, the place where the glass would fit in, or would that have to be done by someone else, a carpenter, for example?

A. They figured removing the old glass and putting [fol. 538] in new glass.

Q. And fitting it in there with the proper sort of adhesive or putty or whatever might be used? A. Yes, sir.

Q. And putting them into place? A. Yes.

Q. About 200 panes? A. Yes, approximately that.

Q. Did you have a contract on that?

A. Well, I talked to Mr. Daniels of the Pittsburgh Plate Glass Company for the basis of my estimates.

Q. The fire doors you stated were three in number. There are five fire doors in the building, are there not?

A. Yes, sir, I think there is.

Q. I think you stated that your estimate of the life of a fire door of that type was eight to ten years? A. Yes.

Q. When were the fire doors replaced by the Kimball Laundry, do you know? A. No, sir.

Q. Could you tell anything about their age by looking them?

A. Well, I think perhaps the one on the fourth floor is about fifteen years old. The others appear newer,

[fol. 539] but I wouldn't say they were any newer than the one on the fourth floor.

Q. What is the matter with the fire doors? Why do they have to be replaced at all?

A. The one on the fourth floor is pretty badly deteriorated.

Q. From what? A. From moisture

Q. Rust? A. Yes.

Q. As a result of moisture? A. Yes, sir.

Q. What would have prevented that, in your estimation, painting with the right kind of paint, put on at the right time and kept on? Would that have prevented the destruction?

Mr. Murphy: Objected to as not proper cross-examination; incompetent and immaterial, in the absence of any showing they were ever painted by Kimball Laundry.

The Court: Sustained.

Q. The terrazzo flooring on the fifth floor, you said you talked with Mr. Marchietti, the man who put them on there originally, and thought it would be $194.00, is that right?

[fol. 540] A. Yes, sir.

Q. Just explain a little bit more fully how much of that work is to be done. Give us something in square feet so that we will know.

A. I went up there with Mr. Marchietti and we went all over the floor on the fifth floor, examined it thoroughly and he estimated that some of it should be chipped out and replaced with new material and then to remove the marks and smooth the floor down, approximately 1500 square feet of the floor should be ground. They have a grinding apparatus for grinding floors.

Q. Like a sander for a floor?

A. Something after that nature?

Q. Something of that type? A. Yes, sir.

Q. And then would anything be put on top of that?

A. On top of the floor?

A. No, after they ground it down with the grinder, would anything be put over the surface of that?

A. Then they buffed it.

Q. So that it won't be so slick you skate on it?

A. No, sir, I think that is just to give it a smooth, hard surface.

Q. You say there are about 1500 square feet of that? [fol. 541] A. Approximately that.

Q. What about that which has to be done over again? Any of it? A. I don't follow you, Mr. Hotz.

Q. What I want to know, is there any part of that floor, of the terrazzo floor on the fifth floor that will have to be replaced with terrazzo?

A. Just a small amount along those brass expansion joints, seams, over near the elevator and on the west side of the floor.

Q. Do you have from this contractor a written bid or guaranty that he will do the job for $194.00?

A. We signed an agreement for this amount of work and what was to be done there.

Q. Now, the emergency room was sort of a hospital room setup and where was that setup, in what part of the building?

A. That was in the southeast corner on the fifth floor.

Q. There is equipment put in there by the government? A. Yes, sir.

Q. Was there any necessity for plumbing or water or anything of that sort that had to be piped in and put in that room? A. There was a utility sink put in there.

[fol. 542] Q. That had been brought in, the water piped in there from elsewhere? A. Yes, sir.

Q. What is the partition made of?

A. Frame partitions with wall board.

Q. How big a space does that room occupy?

A. Probably 500 to 600 square feet.

Q. And you had for that about $45.00 and I suppose that included paving the floor and repairing the walls where the utility sink had been placed?

A. That was to repair the wall.

Q. Just the wall?

A. Yes, sir, the floors, the repair of the terrazzo floor is included in Mr. Marchietti's estimate.

Q. That is put out by your company, the American Laundry Machinery Company?

A. That is right, purchased through—this here was put out by the General Electric Company, which, at that time furnished our motors and our panel boards.

Q. Are you entirely familiar with this setup and machinery equipment there and did you examine its condition down here? A. That is right.

Q. When did you make this examination?

A. That was week before last. We worked through the whole entire plant there, but I think that panel board was thoroughly examined on a Thursday.

Q. Anyway, it has been the last week or two?

A. That is right.

Q. And your entire examination of all of the machinery and everything has been made within the past month?

A. That is right, yes.

[fol. 551] Q. Did you observe the need of some repairs and readjustment of this panel board? A. Yes, we did.

Q. Do you know the reasonable and proper charge of any necessary repairs and readjustments to that panel board?

A. It is on the exhibit there, I think. On those sheets it shows the exact amount. Offhand I couldn't tell you exactly what the panel board ran, unless I would see—we did make up that sheet.

Q. Did you check that figure there and furnish the correct figure to Mr. Crowder of the army engineers?

A. We did, with the assistance of our company, of course.

Q. This may be a bit leading, but with the understanding that I will connect it up—that figure furnished Mr. Crowder was $500.60, as I recall now? Is that the figure you found? A. Yes, that is the figure we found.

Q. Is that the fair and reasonable cost of repairing that panel board? A. That is right.

Q. And if and when such repairs are made, would that board be in good and efficient operation condition?

A. I would say for normal operation it would be efficient.

[fol. 552] Q. Is this particular panel board a currently recognized board, or is that more or less an obsolete type?

A. I wouldn't say exactly obsolete, but it is the older type of board. The new type is furnished directly connected and mounted on the machine.

Q. Referring particularly to the laundry machinery itself, did you have someone with you when you made this check and survey and estimate? A. Mr. Newcom.

Q. Also with the American Laundry Machinery Company? A. Yes, sir.

Q. And the two of you worked together? A. Yes, sir.

Q. And checked every item?

A. Every item individually.

Q. Did you go to every machine and look it over and examine it?

A. We went to each machine and put it in operation.

Q. Checked to see how it operated?

A. Checked to see how it operated both in reverse and straight ahead.

Q. Did you spend several days on that job?

A. We were there something like, altogether, something like four days, if I remember right.

[fol. 553] Q. And then, did you, after making that personal survey and check, get your costs and your figures and figure all these items out? A. We did.

Q. In your final figure did you include the cost of moving displaced machinery down there back to its original place in that building?

A. Yes, we did. We got all those figures compiled together, which showed the total.

Q. Were you furnished with plats showing the original location of each of those machines? A. Yes.

Q. Did you figure, as part of your labor, not only the repair of the machine, but moving it back and installing it and connecting it up for operation in its original position? A. That is right.

Q. When I say "original position" I mean its position in November, 1942, when the army took over.

A. That is right.

Q. Do your figures for repairs include the shipment of parts to Omaha and delivered to the building and installed in the machine right there in the building?

A. The figures of parts were f. o. b. plant, Omaha.

Q. That means here in the plant?

[fol. 554] A. That means here in the plant and the other figures included the installation.

Q. That is what I am getting at. Your figure as finally compiled—.

A. The final compilation of the figures would cover their installation of parts.

Q. Getting the parts into the building and in the machine and installed in the machine right in the Kimball Laundry plant? A. Yes.

Q. And the machine moved to its original position and hooked up and ready to operate? A. That is right.

Mr. Murphy: Before I resume with the witness, if the court please, I understand that it is agreeable with counsel that the three boxes of government records from the laundry may be returned to the laundry after we adjourn this evening, is that correct?

Mr. Hotz: Yes.

The Court: Let the record show it is so ordered.

Q. Mr. LaTurner, did you and your co-worker, Mr. Newcom compile on separate sheets a detailed statement of the parts and labor in connection with this repair of the machinery?

[fol. 555] A. We did.

Q. I will hand you a pad of papers identified at the moment as marked "Original Part 1" in the upper right-hand corner, and ask you if that is a group of such sheets? A. Yes, it is.

Q. Does this particular pad cover all of it, or does that include a part of the third floor? A. Yes, it does.

Mr. Hotz: Does what?

The Court: Which? A. Second and third floors.

The Court: That is, Part 1 covers the second and third floors? A. That is right.

The Court: And Part 2 covers what?

A. Here is a part of the third on Part 2, the fourth and fifth on Part 2.

Q. Do these two pads of paper, clipped in two parts, because one is a little too thick, constitute your sheets for the entire job down there?

A. The entire plant; that is, as far as the laundry machinery is concerned.

The Court: You mean your work sheets?

A. These are the work sheets, yes, sir.

[fol. 556] Q. Before I forget it, Mr. LaTurner, did you furnish Mr. Crowder of the army engineers with copies of these? A. He has the copies of those.

Q. And in fact, were they compiled together with him after you had made your original work? A. That is right.

Q. I believe in your original work you write them out in pencil, did you? A. Yes, that is the original.

Q. And then had them typed in neater form and checked them with your original? A. That is right.

Q. I will ask you if Exhibits 10 and 11, now constitute the typed, but checked work sheets of this job?

A. These are the rectified and typed for neatness originals.

Q. I note near the upper right-hand corner or portion of each sheet two signatures. Whose signatures are those?

A. One is my signature, LaTurner, and Mr. Newcom.

Q. Mr. Newcom was your man with you? A. Yes.

Q. Did you check those sheets when you signed them?

A. We did.

[fol. 557] Q. Turn to the first sheet of Exhibit 10 and I will ask you first whether the printed or mimeographed portion of each sheet is the same throughout?

A. What do you mean by that?

Q. I mean that part other than what is typed and written in in ink? A. Yes, sir, we checked that.

Q. I mean the printed portion, the original printed portion? A. Yes.

Q. Those sheets are all the same? A. Yes.

Q. And then did you fill in a particular item and describe it on each sheet?

Q. I was talking about the utility sink that had been put in there. When that is disconnected and taken out, there will be some repair that will be necessary there, I would think, to the walls, would there not?

A. It was put in a wall. It was attached to a wall that was put in by the government. The water pipes are brought in from overhead and not brought in through the floor.

Q. So, it was connected up with some other wall, was it not, that had been installed since the government had [fol. 543] been there? A. You mean the sink?

Q. Yes.

A. The sink was attached to the wall put in by the government.

Q. So that when you say you are going to remove these partitions, you were not talking about that wall?

A. Yes, sir, I was talking about that wall.

Q. You were talking about that wall? A. Yes, sir.

Q. Is that all included in your $45.00 expense?

A. No, sir, just removing the partitions is included in that $45.00; to remove those water pipes and gas pipes to that emergency room would cost approximately $31.00.

Q. Have you any other items you might have overlooked that either Mr. Murphy or myself have not called to your attention?

A. I don't recall them at this time, sir.

Q. The toilet, $25.00, you told us about that this morning—that is on the second floor. I am speaking now of some additional toilet facilities that were put in on the second floor? Was that a lavatory?

A. A lavatory was moved from its existing position [fol. 544] to allow the installation of a water closet in the men's toilet on the second floor.

Q. $25.00, you think, is the estimate to get that all straightened out as it was?

A. To remove the water closet and reinstall the lavatory in its former position.

Q. Does that include the lavatory itself. A. No, sir.

Q. Where is that? A. It is in the toilet now.

Q. It is in there now? A. Yes, sir.

Q. Who does it belong to?

A. It belongs to the Kimball Laundry.

Q. So, that $25.00 is really an item of labor?

A. Yes, sir.

Q. Calling your attention to Exhibit 33, is that one of the pieces of machinery you spoke of that once had been removed from one floor to another? I will call your attention to the fact that that picture was taken in the Kimball Laundry Company and introduced in evidence, so you don't need to concern yourself about that.

A. When was the picture taken?

Q. It was taken in 1942, I think, just before the [fol. 545] government took over. I think it was taken in the latter part of October or first of November, 1942.

A. Well, it looks to me like it is one of the machines.

Q. It is a big machine that weighs how much, would you say?

A. It would weight several tons. I am not familiar with the weight of machines, but they are heavy machines.

Q. They are very heavy machines? A. Yes, sir.

Q. It is not a minor task to move them? A. No, sir.

Q. Calling your attention to Defendant's Exhibit 40, I will ask you if that also is one of the units that must be moved from one floor to another, or should be if the Kimball Laundry is to be placed where it was?

A. I don't exactly recognize the setup now. It seems similar to some of the machines that are installed at the present time.

Q. Well, they are ironing machines and it is quite apparent from their shape that is what they are. They are ironing shirts on them, according to the picture, aren't they?

[fol. 546] A. They look like shirts, yes, sir.

Q. Couldn't very well be anything else?

Mr. Murphy: Objected to as argumentative and not proper cross-examination.

The Court: Sustained.

Q. Your estimates, of course, didn't include the moving of that machinery about from one place to another?

A. No, sir.

Mr. Hotz: That is all.

Mr. Murphy: That is all, Mr. Pargett.

[fol. 547] MR. DENTON J. LATURNER, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. State your name, please. A. Denton J. LaTurner.

Q. Where do you live?

A. 1919 Olathe Boulevard, Kansas City, Kansas.

Q. What is your business or occupation?

A. I am what is classed as a maintenance engineer for the American Laundry Machinery Company.

Q. Are you a graduate of any engineering school?

A. No, I am not.

Q. How long have you been employed in machinery engineering work?

A. I have put in right around seventeen years for the American Laundry Machinery Company and I have followed this work since 1922.

Q. How long have you been employed by the American Laundry Machinery Company?

A. Well, as I say, about seventeen years with the American Laundry Machinery Company. The first time I went with American was in 1922 and I worked up until close to 1932, and I went with them in 1938 and worked until the present time.

[fol. 548] During the time you were not with the American Laundry Machinery Company, what were you doing?

A. I was buying and selling and contracting on my own initiative.

Q. Have you carefully checked the machinery at the Kimball Laundry plant here at Omaha?

A. I have, each machine individually.

Q. Was most of that machinery—I am referring now to the laundry machinery, furnished originally by your company, the American Laundry Machinery Company?

A. I would say the biggest majority of it; practically all.

Q. Are you very familiar with those machines and their use and purpose? A. I am.

Q. You are not in the selling end of the business, are you? A. None whatever.

Q. You are a maintenance man?

A. Maintenance engineer.

Q. Does that involve the checking of machines to determine their condition and when any repairs are needed and the necessary repairs? A. That is right.

Q. And did you carefully check over machines in that [fol. 549] building with that in mind? A. That is right.

Q. I take it, it is part of your business to know labor costs and parts costs and all those things?

A. That is right.

Q. Before going to the more or less movable laundry machinery, there is one other item. I believe in the building down there they have some kind of an electric panel board, is that right? A. That is right.

Q. Machine panel board is the correct name for it?

A. It is a panel board for the Cascade washing machine. That is sold directly with the machine itself when it is purchased from our factory.

Q. I will hand you Exhibit 31 and ask you to examine that and state whether that is the panel board you are speaking of?

A. This is a panel board furnished by the American Laundry Machinery Company with each individual Cascade washer. I would say from a small, up to the large 42 by 84 washer; and each one of these sections is furnished—if you will notice, that is divided into sections, which appears to be in the neighborhood of about 24 by 30 inches square there. Each one of those comes out with [fol. 550] that type of washer.

Q. Do you recognize that Exhibit 31 as being a picture of the particular panel board in the Kimball Laundry building?

A. That is right, with the exception there is one section that is missing here. It doesn't show it.

[fol. 1108] Gov't Ex. 11 (Received)—Continued

Sheet No. 268 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)
Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:
(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 19 & 20 Present Location 5th Floor Original Location Same
Description of Item Baker Ice Machine
Bulletin No.
Serial No. 251-40-AA Model or Style 5 HP
Year Installed 1937 Age of Equipment (Years) 9 years
Date of This Survey Febr. 36, 1946 Surveyed By

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Hookup of Motor & Compressor 2-25-46	Electricians from Ft. Omaha sent down by Buckwalter found that motor worked, compressor. Has hole in head cap.					
New head cap		7.28				7.28
Head Gasket		.83				.83
Valve Plate Gasket		.83				.83
Labor			2½	1.50	3.75	3.75
Freon 35#	.50/#					17.50
Labor			10	1.50	15.00	15.00
						45.19
Contingencies for possible items listed under "Remarks" 50%						22.60
						77.79

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
OK						
TOTAL RESTORATION COST—"A" plus "B"						77.79

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

Complete check of system pending repair of compressor. If shaft is bent due to excessive pressure, complete check of compressor will cost extra.

Repair Parts Cost from No.

[fol. 1108] Gov't Ex. 11 (Received)—Continued

Sheet No. 269 Restoration Survey Worksheet A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)
Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:
(1) Wear and tear (2) Damage due to negligence by Government personnel. (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 21 Present Location 5th Floor Original Location 5th Floor
Description of Item Peerless Gem Paper cutter
Bulletin No.
Serial No. 9700 Model or Style....
Year Installed 1925 Age of Equipment (Years)
Date of This Survey 15 Febr. 46 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
O.K.						

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Relocate	Millwright		1	1.45	1.45	
	Laborer		1	.85	.85	
						2.30
Misc. Bolts and Nuts	L.S.	.50	1			.50
						2.80
TOTAL RESTORATION COST—"A" plus "B"						2.80

A. On each sheet when we went to a machine, we put the serial number, size and type, and all, of the machine, as we went through.

Q. And also the date of the survey? A. That is right.

Q. Over at the left, Description of Parts or Work Required for Normal Operation, did you list under there the work to be done on the particular machine?

A. That is the particular itemizing, like on the first, we will say, for instance, was 2 - #144 - that is the bulletin, as you will notice on the top where it says Bulletin [fol. 558] so and so on those sheets; then it says here: 2 — that means 2 of those particular parts — 144 Main Journal Box Bushings $1.55 apiece, and two of them to be—

Q. We are going a little too fast. The left column, two of them? A. Yes.

Q. And the next item is headed Unit Materials Cost. Is that what you mean?

A. That means one of each individual part costs that amount of money.

Q. The second column is headed Total Materials Cost. I suppose that means if there are two of that particular part, then it would be twice the amount in the first column? A. That is right.

Q. And if three, it would be three times?

A. That is right.

Q. Labor Man Hours is the next column. Did you estimate there the length of time it would take for each job? A. That is right.

Q. And listed that? A. Yes, sir.

Q. And then you have, Labor Rate/Hour. What rates [fol. 559] did you charge?

A. $2.85 for Special American Laundry Machinery Company and then the helper 85c an hour.

Q. Are those regular going rates for that work?

A. As a general rule it varies in different localities.

Q. Is that the Omaha rate?

A. That is the Omaha rate.

Q. And that is the amount you mentioned per hour?

A. That is right.

Q. And the next column is headed Total Labor Cost. Is that merely a compilation to get the number of hours times the amount per hour and get your total?

A. If you will notice on that one column Labor Man Hours, 12 hours, the whole thing is totaled up on the last column.

Q. And then totaled up on the bottom of the column, the Total Labor Costs? A. That is right.

Q. And then at the extreme right, a column headed Total Costs Labor & Materials. Have you added, then, in that column both labor and materials?

A. That is right.

Q. Then, down under B. Cost to Relocate in Original Position. What does that mean?

A. That means, if it has to be relocated, moving, re-
[fol. 560] connecting and bolted to the floor. That is to cover that.

Q. That is to cover that? A. Yes, sir.

Q. So, this bottom portion covers labor of removing and resetting up and connecting, ready for operation in its original position? A. Including bolting to the floor.

Q. Including bolting to the floor and connecting it up? A. Yes, sir, that is right.

Q. Some machines, I presume, there wasn't anything to be done on them in that connection? A. There is, yes.

Q. And in those instances, the sheet is blank in that part? A. That is right.

Q. Then, down near the bottom, in between two lines, I see Total Restoration Costs—"A" plus "B", and an amount over at the right. A. What sheet are you on?

Q. I have a different sheet than you have.

A. Yes, I see that is what that is, yes.

Q. Is that then the total cost of the parts and labor all installed down here in the plant, and moving the machine down and setting it up?

[fol. 561] A. That is right at the bottom where it says Repair Parts Costs from American Laundry Machinery Company, and so forth, right at the bottom there, isn't it? Right down here is where that should show.

Q. On the particular sheet you are looking at there, apparently there was no removal cost? A. No.

Q. Turn over to sheet number 6 of Exhibit 10. Does that sheet disclose some charge of each of the three types I have mentioned; that is, parts, labor, installing parts, removal and setting up charge?

A. The repair parts and the installation of those repairs is $151.40, and including at the bottom where it shows relocation—that is relocating at original position—that sums up $34.31, which is $185.81.

Q. Get my question, please. Does that sheet contain and show the cost of the parts? A. That is right.

Q. And then under the proper heading, the labor cost of installing the parts? A. Yes, that is right.

Q. And those two items are totaled?

A. Yes, that is right.

Q. And then down under B. at the bottom, the cost of [fol. 562] removing and resetting the particular machine? A. Yes.

Q. And then is that added to the total of the parts and labor of installing the parts?

A. That is all added in one.

Q. That is all added in one, so that at the end, you have the total cost for all three items? A. That is right.

Q. And that is worked out on each sheet, is it?

A. Each sheet.

Q. And each sheet describes the particular machine to which it applies? A. That is right, yes.

Q. Did you compile separately and briefly a total statement showing the cost of parts, the cost of labor to install parts and the cost of relocating in original position and making connections? A. Yes, sir.

Q. I will hand you Government's Exhibit 12 and ask you to state, without reading any of the figures, what that is.

A. This is costs to place laundry and dry cleaning machinery in good and efficient operating condition, relocated in original position occupied at time of taking by government; total costs of parts delivered at building,

[fol. 563] Omaha, Nebraska, total costs of labor to install parts and make repairs; total costs to relate in original position and make connections, and ready for operation.

Q. Did you compile that Exhibit 12 from the detailed and itemized work sheets in Exhibits 10 and 11?

A. That is taken from those sheets.

Q. And is that correct? A. That is correct.

Mr. Murphy: The Government at this time offers in evidence Government's Exhibits 10, 11 and 12.

Mr. Hotz: May I ask the witness a question or two?

The Court: Very well.

Mr. Hotz: Q. Did I understand that you stated that this would place this machinery in the condition it was when it was taken over by the Government in 1942?

A. That is right.

Mr. Hotz: Q. Were you here in 1942?

Mr. Murphy: Objected to as not proper cross-examination for the purpose stated.

The Court: That will be sustained. Are you objecting to the exhibits?

Mr. Hotz: Yes.

[fol. 564] The Court: Let us have your objection.

Mr. Hotz: Object to the exhibits as self-serving declarations of the witness; not the best evidence; not tending to prove any issues in the case; merely a matter of a compilation of repairs; the witness not showing himself to have examined these machines and equipment in 1942 when they were taken over, and yet, proposes, by the statement that he made, to say he could put them back where they were in 1942.

The Court: That isn't what he said. What he said was that with this money he would put all this machinery in good, workmanship condition, good operating condition. Go back and get the question.

Question read.

The Court: Have you completed your objection?

Mr. Hotz: No, and we further object to the statement contained on Exhibit 12, on the top of the exhibit, especially, and object to that as not proper evidence.

The Court: Objection overruled.

Mr. Hôtz: In reference to Exhibit 10, we object to the exhibit as self-serving. It is incompetent, the witness having not shown himself qualified to compile an instrument such as Exhibit 10, which uses the word "restoration."

[fol. 565] The Court: Are you not now repeating the objection you made in the first instance to all three exhibits?

Mr. Hotz: I didn't include only the one.

The Court: It is the same language. I don't know what you had in your mind, and if there is anything more you wish to add, do so.

Mr. Hotz: It is the same objection to Exhibit 11 as to the three exhibits, and we will make these objections to each one of these exhibits. They are made up on forms to be filled out and the witness not having shown himself qualified to give the conclusions that the exhibit calls for, such as restoration, and that applies to all three of the exhibits.

The Court: The court adheres to its former rulings and overrules the objections and receives the exhibits in evidence.

Government's Exhibit No. 10, found in Volume IV, at Page 1107.

Government's Exhibit No. 11, found in Volume IV, at Page 1108.

Government's Exhibit No. 12, found in Volume IV, at Page 1109.

[fol. 1107] G. Ex. 10 (Received)

Sheet No. 1 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)
Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:
(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 1 Present Location 2nd Floor Original Location Same
Description of Item Utex Washer 24"x36" One Compartment
Bulletin No. 18A, March 1936
Serial No. 233M2113 Model or Style American Laundry Co.
Year Installed 1925 Age of Equipment (Years)
Date of This Survey 12 Febr. 1946 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Costs	Total Costs Labor & Materials
2—#144 Main Journal Box Bushings	1.55	3.10				
1—#124 Valve Disc Gasket	.55	.55				
1—#120 Splash Guard	4.25	4.25				
Plus the following parts for Reversing starter Ser. #018M2694 220 Volt A.C. ¾ H.P.						
1—Set of Points	4.80 set	4.80				
1—Interlocking Bar	1.60	1.60				
		14.30				14.30
	Special					
	ALM		12	2.85	34.20	
	Helper		12	.85	10.20	
					44.40	
						44.40
						58.70

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total C Labo Mater

TOTAL RESTORATION COST—"A" plus "B"

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from A. L. M. Co. No.

[fol. 1107] G. Ex. 10 (Received)—Continued

Sheet No. 147 Restoration Survey Worksheet for A-

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Governme personnel (3) Restoration or reinstallations necessitated by terations or removals by the Government.

Item No. 131 Present Location 4th Floor Original Location 3d Flo

Description of Item 2 Fantom Fast Markers

Bulletin No.

Serial No. Model or Style

Year Installed 1937 Age of Equipment (Years)

Date of This Survey 16 Feb 46 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Co Labo Materi
4 Mercury Lamps for FF Units	5.60	22.40				
4 Curtain Brackets	1.30	5.20				
2 Listing Machines to be cleaned & adjusted & equipped with new ribbons	7.50	15.00				
4 Lamp Shades, Brackets & Flexible Conduits	4.25	17.00				
2 Transformers for lights	11.00	22.00				
2 Foot Operating Pedals	4.25	8.50				

Millwright	8	1.45	11.60
Laborer	8	.85	6.80
Electrician	10	1.58	15.80
Elec. Helper	10	1.07	10.70
			44.90
			135.00

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Millwright			2	1.45	2.90	
Laborer			2	.85	1.70	
Electrician			2	1.58	3.16	
Helper			2	1.07	2.14	
						9.90

TOTAL RESTORATION COST—"A" plus "B" $144.90

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

[fol. 1107] G. Ex. 10 (Received)—Continued

Sheet No. 148 Restoration Survey Worksheet for 4-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 132 Present Location Ft. Omaha

Original Location 3rd Floor

Description of Item 6 Hand Marking Cages

Bulletin No.

Serial No. Model or Style

Year Installed Age of Equipment (Years)

Date of This Survey 16 Feb. 46 Surveyed By D. LaTurner

R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Replace 6 Hand Marking Cages						
Value at time of taking as per L. C. Sholes Report	33.33	200.00				200.00

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Relocate in original position on 3rd Floor	Carpenter		12	1.45	17.40	17.40
	Laborer		12	.85	10.20	10.20
Miscellaneous						27.60
TOTAL RESTORATION COST—"A" plus "B"						227.60

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

*Dismantled by Gov't.—Restore.

Repair Parts Costs from No.

[fol. 1107] G. Ex. 10 (Received)—Continued

Sheet No. 140 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 133 Present Location Ft. Omaha

Original Location 3rd Floor

Description of Item Wood Chute for Marking Cages

Bulletin No.

Serial No. Model or Style

Year Installed Age of Equipment (Years)

Date of This Survey 16 Feb. 46 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Removed by Gov't. Value at time of taking as per L. C. Sholes report	14.00	14.00				14.00

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Relocate in original position on 3rd Floor						
	Carpenter		2	1.45	2.90	2.90
	Laborer		2	.85	1.70	1.70
						4.60

TOTAL RESTORATION COST—"A" plus "B" $18.60

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

*Returned to QM (Kimball) Laundry—15 Febr. 1946

Repair Parts Costs from No.

Exhibit 10: This exhibit consists of a total of 151 pages, all similar in form to those printed and containing similar detailed estimates by witness of cost of repairing, replacing, and restoring machinery on the second and third floors of the building in question. The totals of these items are given elsewhere in Government's Exhibit 12.

[fol. 1108] Gov't Ex. 11 (Received)

Sheet No. 150 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 134 Present Location Unknown Original Location 3d Floor

Description of Item Underwear Frames (12)
Bulletin No.
Serial No. None Model or Style
Year Installed Age of Equipment (Years)
Date of This Survey 16 Feb. 46 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Underwear frames could not be located, value at time of taking in accordance with L. C. Sholes report	60.00	60.00				60.00

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials

TOTAL RESTORATION COST—"A" plus "B" $60.00

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

[fol. 1408] Gov't Ex. 11 (Received)—Continued
Sheet No. 267 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)
Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:
(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 18 Present Location 5th Floor Original Location Same
Description of Item Reliable Comb. drum and Cage fur cleaner
Bulletin No.

Serial No. Model or Style
Year Installed 1935 Age of Equipment (Years)

Date of This Survey 15 Febr 46 Surveyed By D. LaTurner
R. I. Newcom

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials

O.K.—No repairs required

B. Cost to Relocate in Original Position, as per (3) Above

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials

O.K.—Not moved by Government

TOTAL RESTORATION COST—"A" plus "B"

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

Remarks: All above prices are F.O.B. 1502 Jones Street, Omaha, Nebraska

* In Soap Room

Repair Parts Costs from No.

Exhibit 11: This exhibit consists of many additional pages, and is similar in form to that of Exhibit 10 but covers additional machinery on other floors, particularly the fourth and fifth floors of the building in question. The totals of this exhibit also are given elsewhere in Government's Exhibit 12.

[fol. 1109] Gov't Ex. 12 (Received)

Costs to Place Laundry and Dry Cleaning Machinery in Good and Efficient Operating Condition, Relocated in Original Position Occupied at Time of "Taking" by Government

1.	Total Costs of Parts Delivered at Building, Omaha, Nebraska	$ 5,021.87
2.	Total Costs of Labor to Install Parts and Make Repairs	3,917.51
3.	Total Costs to Relocate in Original Position and Make Connections, and Ready for Operation	2,729.35
	Grand Total of Above	$11,668.73

Mr. Murphy: May I read the short one to the jury at this time please?

[fol. 567] The Court: Very well.

Mr. Murphy: (Reading Government's Exhibit 12) Costs to place laundry and dry cleaning machinery in good and efficient operating condition, relocated in original position at time of "'taking" by Goverment

1.	Total Costs of Parts Delivered at Building, Omaha, Nebraska	$ 5,021.87
2.	Total Costs of Labor to Install Parts and Make Repairs	3,917.51
3.	Total Costs to Relocate in Original Position and Make Connections, and Ready for Operation	2,729.35
	Grand Total of Above	$11,668.73

Q. Is that your opinion as to the fair and reasonable cost of these repairs you have detailed? A. It is.

Q. And the work of relocating the machines?

A. That is right.

Mr. Murphy: You may cross-examine.

Cross-Examination of Denton J. LaTurner by Mr. Hotz:

Q. Exhibit No. 12 is a compilation of Exhibits Nos. 10 and 11, is that right? A. Yes.

Q. Where did you get these mimeographed forms upon which Exhibits 10 and 11 are made?

A. They were obtained through the army engineers. [fol. 568] We obtained them from them.

Q. What do you mean by "army engineers," of the American Laundry Machinery Company or the United States? A. No, United States Engineers.

Q. You did not make an examination of this machinery in 1942, did you? A. No.

Q. You don't undertake to estimate the value of that machinery and the condition of the machines as they were when they were taken over by the government in 1942?

A. No.

Q. That isn't your idea? A. No. That isn't my line.

Q. What you have done is to go through those machines as you found them now? A. Yes.

Q. And in the time you put in on it you picked out the necessary repairs and replacements that were required to put the machines in operable condition, those that needed repairs? A. That is right.

Q. How long did you work? Did you say four days?

A. It was four days. Well, I would say a little over four days on the whole thing. We were back and forth [fol. 569] on that, putting in eight hours a day.

Q. Do you know the time you put in?

A. Yes, we put in, compiling the figures and all sheets, right at two weeks.

Q. In the examination of the machines at the plant?

A. That is right. I would say we put in over four days.

Q. In getting up these figures, showing the installation of different parts, it was all small items, for the most part, was it not, such as screws and bolts and worn parts that had to be replaced?

A. I wouldn't say small parts. Some of them were pretty large.

Q. For example? A. Like new gears and new bearings.

Q. Did you take down and examine the bearings on ever machine?

A. We made what is known to mechanics as an old man and a lot of people would call it a jack, but we used

a chain and more or less of a jack, and checked those bearings very carefully to get the amount of play up and down in the bearings; the worn amount of play.

Q. But you did not take them down and examine each one? A. We didn't tear them apart, no.

Q. But this work of putting in the amounts you specify [fol. 570] here, you wouldn't undertake to say that would put those machines back in the same value or condition they were in 1942?

A. There is a depreciation there in value, but not efficient operation. They would be in as good condition as they were in 1942.

Q. But that is all you can say, not having seen the machines in 1942? A. That is right.

Q. That is the best you can do? A. That is right.

Q. I would like to have you explain in reference to some of these items, whether or not they can be repaired completely here in Omaha, Nebraska?

A. Well, there is everything here that can be repaired I believe, with the exception of some parts known as extractor basket containers—they were figured in there to be sent back to the factory and repaired; that is, to put new shells on them.

Q. You didn't make these repairs that are on these exhibits? They haven't been made? A. No.

Q. Your idea is that if these repairs are made, that will put the machines in running order so you can operate them?

[fol. 571] A. In efficient normal operation.

Q. Normal operation? A. Yes.

Q. From your examination of these machines that were there, could you state what effect it would have on the machines to run them without these repairs placed on them?

Mr. Murphy: Objected to as not proper cross-examination; calling for pure speculation.

The Court: Sustained.

Q. Can you do this: Could you tell us from the examination of the machines, when some of those repairs became

necessary? Could you tell us from your examination of these machines when those repairs became necessary? How long ago?

A. That would be hard to say because some of those machines haven't been used for some time and I can't tell you.

Q. If they have been used, could you tell when the bearings should have been taken up?

A. From the mechanical standpoint, any machine that shows the least bit of wear, if there is any maintenance engineer, which I understand there was down there, he should have taken care of it.

Q. It should have been taken care of, then?

[fol. 572] A. He was lax on his job if it wasn't done.

The Court: Is there any difference between this machinery than any other machinery? A. Not a bit.

The Court: If it isn't taken care of, it will wear out?

A. Yes.

Q. Have you any list of these machines that were able to operate without these repairs?

A. They are all operating without them now. I know of two machines—I think, if I can recall, about three machines that are out of operation and they are in storage.

Q. These lists, of course, don't propose to show what machines were in there in 1942 that are not there now?

A. I couldn't answer that.

Q. You don't know anything about that?

A. No, I don't know anything about that.

Q. Which machines principally, without going through this mass of exhibits, because we haven't had time and we only saw them and no copy has been furnished to us—I want to ask a few general questions—generally, which machines are these parts necessary on, without saying all of them? Just which ones particularly?

A. Well, I would say the washing machine is; naturally in any laundry of all use, you find the biggest part of your repairs for washing machines.

Q. In the washing machine?

A. It is in your washing machine.

Q. And that is where the heavy duty, heavy work was performed, with these machines, is that right? A. Yes, sir.

Q. They show the wear and tear more than any others?

A. Yes, sir.

Q. I think you told us that you would be unable to testify the difference in value of these machines as they were in 1942 and now; that that was not within your province? A. I couldn't do that.

Mr. Hotz: Your Honor, I could go on with a few staggering questions here—

The Court: Suppose you pass it and we will go on with someone else and give you the privilege of calling him back for further cross-examination tomorrow.

Mr. Hotz: I would like to have a chance to glance over these tomorrow.

The Court: Can you call another witness?

[fol. 574] Mr. Murphy: I can call his co-worker very briefly so that counsel will have the same right as to him.

Mr. Ross I. Newcom, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Give the Reporter your name, please.

A. Ross I. Newcom.

Q. And your address? A. 845 King, Denver, Colorado.

Q. What is your business or occupation?

A. Construction engineer for the American Laundry Machinery Company.

Q. How long have you been so employed by that company? A. Five years.

Q. Did you work with Mr. LaTurner, the witness who has just left the witness stand, in checking machine by machine the laundry machinery in the quartermaster laundry or formerly Kimball Laundry building here in Omaha? A. Yes, sir.

Q. You have been here in the courtroom and have heard him testify? A. That is right.

[fol. 575] Q. Did you work with him in the work and in

compiling Government's Exhibits 10, 11 and 12—wait until I show you what I am talking about. I hand you the exhibits that I am talking about, that being 10, and this being 11, and this being 12, whether you worked with Mr. LaTurner in compiling those exhibits? A. That is right.

A. I note the name R. L. Newcom on the upper right-hand portion of those sheets. Did you sign that yourself? A. Yes, sir.

Q. And checked sheet by sheet with Mr. LaTurner and compiled and assisted Mr. Crowder in compiling the totals? A. That is right.

Q. Do you have anything to add or subtract from Mr. LaTurner's testimony, or did you work with him and is your version the same as his?

A. Our version carried right through on this closely.

Q. You worked right together and made the examinations? A. Yes.

Q. That is part of your work?

A. Yes; each individual machine.

Q. And this kind of work is your particular type of work is it?

[fol. 576] A. That is right.

Q. Does Exhibit 12, in your opinion, correctly reflect the fair and reasonable charge and costs of the work thereon shown? A. That is right.

Mr. Murphy: You may cross-examine.

Cross-Examination of Ross I. Newcom by Mr. Hotz:

Q. In making your examinations, Mr. Newcom, you had certain forms that were furnished you by the government to fill out, isn't that right?

A. That is right, these sheets I have here.

Q. 10 and 11, they furnished the mimeographed forms for you men to fill in? A. That is right.

Q. Who went around the plant with you when you were doing this work?

A. Mr. LaTurner, Mr. Crowder and Mr. Pargett.

Q. Who was Mr. Crowder?

A. A United States Engineer.

Q. Not connected with your company? He is connected with the government? A. That is right.

Q. Who was the other man?

A. Mr. Pargett, who was on the stand a while ago.

Q. He is with the engineers?

[fol. 577] A. That is right.

Q. In making these observations that you have made as to the conclusions you have drawn and figures you have given, you have made no attempt, have you, to evaluate those machines as they were in 1942? A. No, sir.

Q. You haven't done that? A. No, sir.

Q. As a matter of fact, you didn't know what condition they were in then? A. Absolutely not.

Q. You haven't attempted in any of the work that you have done, as manifested now and shown in Exhibits 10, 11 and 12, to give any valuations? A. No, sir.

Q. It wasn't a question of value as of then and now?

A. No, sir.

Q. It was merely a question of what parts and repairs ought to be put on those machines?

A. Making them efficient machines, yes.

Q. I noticed on the top of Exhibit 12, which no doubt went in over your signature, or which you have approved, it says, Costs to place laundry and dry cleaning machinery in good and efficient operating condition, relocated in original position occupied at time of "taking" by government?

[fol. 578] A. That is right.

Q. What I want to ask there, Mr. Witness, is this: There are two things in there. Should that not be a period instead of a comma? Should you say: Costs to place laundry and dry cleaning machinery in good and efficient operating condition period, and then say Relocate in original position occupied at time of "taking" by government?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial.

The Court: I think we had better adhere to our function as being appraisers of the damage rather than touching or going into the problem of punctuation or grammar.

Q. You do have two items in there? You put in this exhibit what it is going to cost to move the machinery from one part of the building to another? A. Yes, sir.

Q. And that is separate and distinct, isn't that right?

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial; not proper cross-examination; the exhibit on its face discloses that is exactly the situation and being the best evidence.

The Court: And the other evidence in the case is to [fol. 579] the effect that some of the machinery was moved from one floor to another and they propose on this appraisal to cover the cost of relocating it in its original location. We understand that. Let's not quibble about it.

Q. From your examination of these machines, could you tell when these repairs became necessary on them in the past? A. No, sir.

Q. You could do that? A. No, sir.

The Court: Suppose we get at it another way. To what extent are they worn? Any of them? Can you tell us that so that we can form some idea of the length of time? The extent of the wear might indicate the length of time they were being worn. Could you do that?

A. These machines were put in there, as I understand it, in 1923 and 1924 and 1925, along in there, and some of them later, and they wore this amount in that length of time. When they wore, and one thing and another we can not say.

The Court: Were some parts of some machines worn more than others? A. That is, I suppose, right, yes, sir. [fol. 580] The Court: There is no way of getting at that at all, except just the extent of the wear, and that would depend somewhat on the manner in which it was used?

A. That is right. The only way we could approach the problem is to put the machines back in operating condition now.

The Court: I take it these machines used oil like every other machine? A. Oil and grease.

The Court: While you were there, did you observe they were oiled and greased in that respect? Were there some of them that were not oiled and not taking oil?

A. I didn't happen to run into any in particular, no, sir, that weren't oiled or greased at the particular time. Evidently that caused the wear, and they didn't get oil and grease all the time or they wouldn't have been worn.

Q. Was there any evidence of overloading of machines? A. That would be hard to answer.

Q. You couldn't tell? You didn't attempt to check records or anything of that sort to see whether or not they showed the machines were operated with poundage more than the limit placed on the sign, or on the machine? [fol. 581] A. I wasn't here for that purpose.

Q. Your only purpose then, was to—

The Court: You didn't check that? A. No, sir.

Mr. Hotz: I think that is all we can ask until we examine the exhibits.

Redirect Examination of Ross I. Newcom
by Mr. Murphy:

Q. From this examination you made of this machinery, did you observe anything other than the ordinary condition that you find in machinery of that type and volume from the usual wear and tear in operation and use of that machine?

A. I don't exactly follow you on that. You mean compared with other laundries?

Q. No, my question was rather—

The Court: Damage beyond the ordinary wear and tear of the machine?

Q. Taking machinery generally, it wears out in time?

A. That is right.

Q. And this machinery, some of it was worn?

A. That is right.

Q. I suppose there were some machines there that didn't require any repair? A. That is right.

[fol. 582] Q. And that ran on down to some that needed quite a little repair? A. That is right.

Q. Is that an abnormal condition or situation you would find in any industrial plant that uses considerable industrial machinery? A. I wouldn't say it was.

Q. There is a constant wearing, no matter what you do? A. That is right.

[fol. 583] March 12, 1946.

DENTON J. LATURNER, having been previously produced and duly sworn as a witness on behalf of the *Government*, was recalled for further

Cross-Examination of Denton J. LaTurner by Mr. Hotz:

Mr. Hotz: I will ask the witness, Mr. LaTurner, to procure the original Exhibits 10, 11 and 12, and wish to examine him in connection with them.

Q. Do you have Exhibit 12? A. Yes.

Q. That is the small sheet of paper? A. That is right.

Q. Did you check the figures on Exhibit 12 with all the sheets that go to make up Exhibits 10 and 11?

A. To the best of my knowledge, we did.

Q. I am asking you, did you personally do it? A. Yes.

Q. I mean personally check them?

A. I personally went through them.

Q. Did you personally arrive at the figures on Exhibit 12, or was that left to adding machines and somebody else to do?

A. That was left to me and the adding machine and Mr. Newcom.

Q. Who made up Exhibit 12?

[fol. 584] A. This was made up by the engineers, the United States Engineers, after the figures were all compiled.

Q. Take Exhibit 10, if you will please, and you can put Exhibit 12 away so you won't be bothered with that, and you can also put Exhibit 11 to one side and make it a little more convenient for you. I wish you would turn to sheet number 5. Up at the top it gives three alternatives. It says: Restoration will include the following: (1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government. Then, down elsewhere in this exhibit it states under A, it says,

Current Repairs Required for Restoration Set Forth Under (1) and (2) Above. (1) is Wear and tear and (2) is Damage due to negligence by Government personnel?

A. That is right.

Q. And that is what you did? A. Yes, sir.

Q. And then you and Mr. Newcom signed your names to some of these sheets? A. Yes, sir.

Q. And you did that to the particular sheet number 5 you have?

[fol. 585] A. Yes.

Q. And some of the sheets you didn't sign at all?

A. Some of the sheets I didn't have anything to do with at all.

Q. The total number of sheets, as I have it, in Exhibit 10, which you have in your hand, is 149 pages or sheets, and Exhibit 11 is 120, or a total of 269, and do you know how many of those you had to do with?

A. Off-hand, no. I would have to go through and check them.

Q. Would anything you had anything to do with bear you signature?

A. There was some—well, no, it would all bear our signatures if we had something to do with it. There were a lot of things not American Laundry Machinery. In other words, we were hired to come and check that machinery with them and for them and give them our opinion as mechanics and machinists as to what it would cost to put them back in condition.

Q. Turn to that Item 5 and referring now to Exhibit 10 you state on that exhibit, "This item not used by Government. No restoration." How did you know that was never used by the government.

A. I have got their word for it.

Q. Whose word did you take for it?

[fol. 586] A. The engineer of the laundry there.

Q. What was that? What kind of a machine was that?

A. American Laundry Machinery Company 26-inch extractor, under-drive type.

Q. What is that?

A. That is a machine that clothes is taken from the washer and put into this machine and centrifugal force—in home use they call them spinners, on a home washer—we call this a centrifugal wringer. In other words, it spins so fast it throws the water out within ten to twelve minutes and it is dry enough to iron.

Q. It is a dryer? A. It is a dryer, yes.

Q. You had no figures on there in connection with that machine. All that you said on this item was "This item not used by Government. No restoration." And you signed that?

A. Yes, sir, we looked it over to see if there was anything wrong with it; in fact, looked them all over.

Q. Who put in this item "not used by Government"?

A. That is naturally according to their figures down there. We couldn't tell whether it was used or not. All we could go by was what they told us, but we did go over the machine, anyhow.

[fol. 587] Q. But you don't know whether it was used by the government or not? A. I couldn't say as to that.

Q. Turn to page 21 on Exhibit 10. Did you sign that sheet? A. Yes.

Q. Is that signed by you? A. That is signed by me.

Q. And that pertains to an extractor?

A. Yes, that is the large type.

Q. You said on that thing that it was a factory job to repair that? A. Yes.

Q. And you said: "estimated lump sum from recent repair costs by QM"?

A. That is right. We looked it up in their records. They paid that much to have it done by the factory.

Q. To have what done?

A. The baskets fixed. This job was big enough.

Q. Was that job already done?

A. They had part of it done.

Q. What part?

A. They had one set of baskets or containers sent to the factory and repaired, which was returned not so long ago.

Q. The whole thing says: "1 Brake operating, Latch [fol. 589] Cover #65—Switch 10327—H 10 Repair 1 Set Notrux Extractor containers. Factory job ALM Co.—estimated lump sum from recent repair costs by QM?

A. That is right.

Q. $176.30. There is nothing personal about your own opinion or estimation?

A. Only what we have looked up and seen what was wrong and seen what it needed and we specified sending those in to get them fixed, those containers you spoke of.

Q. But you estimated it from the recent repair cost by the quartermaster, is that right?

A. They had it done, the same job we estimated, had it done by our factory.

Q. Before, is what you mean? A. Yes.

Q. And it cost $176.30 before, and so you took from their records that it would cost that again? A. No.

Q. What did you do?

A. It cost $165.00 for that particular job you were speaking about.

Q. You just said because it cost that before it would cost that again.

A. No doubt it would. It is a factory job and they [fol. 590] have standard prices.

Q. But you are not an estimator; you are a repair man? A. I am a repair man, yes.

Q. I wish you would turn to page 23, and that is a Fantom Fast Marking Unit, seven of them, is that right?

A. Yes.

Q. And you signed your name to that one? A. Yes.

Q. And it takes in a readjustment of different items covering nearly the whole page, isn't that right?

A. That is right.

Q. Isn't that an electrical job? A. Not altogether, no.

Q. Isn't it substantially all an electrical job?

A. I wouldn't say that; I wouldn't say that it is.

Q. How much of it is and how much of it isn't?

A. I wouldn't know without going into that.

Q. You have got it all before you.

A. I can't determine that exactly, but I would say it is about a fifty-fifty proposition.

Q. Just what is the item? A. What do you mean?

Q. What kind of a thing is it? Explain it to us, a Fantom Fast Marking Unit?

[fol. 591] A. It is marking-machines to mark the clothes in when they bring them in the laundry.

Q. Is that a piece of equipment of the American Laundry Machinery Company? A. No, sir.

Q. Did you install one of these?

A. I have installed National and others.

Q. Where did you get your estimates in connection with these various parts and the costs and expense? Where did you get them?

A. These were Mr. Crowder's on these repairs.

Q. You signed?

A. We was all over the machinery with him to see what was needed to put it back in efficient operation. There are our work sheets, what we worked by. That is why we signed them.

Q. It was made up on a mimeographed form to fill out by the engineers? A. Yes.

Q. And sheet 23— A. We are on 23.

Q. Sheet number 24, I mean. That is conveyor, is it not? A. Yes.

Q. Installed in 1939?

[fol. 592] A. Yes.

Q. You say, in connection with it, "O.K." and signed the sheet number 24, did you not? A. That is right.

Q. What is a conveyor?

A. A conveyor to convey shirts or materials from one press unit to another in different classifications of operation.

Q. Where was the conveyor purchased?

A. Purchased from the American Laundry Machinery Company.

Q. On sheet 25, which is a monorail with hoist. On one part of the exhibit at the top you say "O.K.", do you not? A. Yes, as far as we were concerned on repairs.

Q. What you have at the bottom of $65.20, that is to relocate it, is it not?

A. That is some of the parts that they changed on them.

Q. What do you mean by that, "'Relocate 10 inch I Beam Steel Monorail, Electrical Bus line, brackets and miscellaneous hardware which was removed for exhaust ducts from Dry Tumblers''? Where did you get that phrase from to put in sheet 25? Who gave you that?

[fol. 593] A. They set a big tumbler in there and it extended over—

Q. Did you put that word in there?

A. No, that was put in by the engineer.

Q. Page 25, an electric fan. Is that a part of the equipment of the American Laundry Machinery Company?

A. No, it is not.

Q. You signed it as being in first-class condition, didn't you? A. That is right.

Q. You are not an electrician, I take it?

A. I have a working knowledge of it.

Q. Turn to sheet 32. What is that?

A. Heubsch handkerchief fluffer.

Q. How big a machine is it?

A. A little small thing that sits on top of the handkerchief ironer to recondition handkerchiefs before you press them.

Q. There are Miscellaneous Elect. Materials, down at the bottom of that page, is that right? A. That is right.

Q. Is that your equipment?

A. No, this is the Heubsch equipment.

Q. You have a total estimate on that page of $26.31, and "transferred to storage on first floor of QM (Kim-

[fol. 594] ball) Laundry on 15 Febr 46"?

A. That is right.

Q. How do you know it was moved back?

A. They moved it back while we were over there.

Q. They took it up the day you were there and you saw that, isn't that right?

A. I didn't see it. They told me they wanted to get it and take it up, but I didn't see it.

Q. That is not American Laundry Machinery Company equipment, either, is it? A. No, sir.

Q. The thing we have just been talking about? A. No.

Q. On sheet 34 you signed that sheet, did you not?

A. That is right.

Q. On Item 34, what is that?

A. That is a dry room, complete with steam heating, coil, belt driven fan, tracks, hangers, doors and latches and so forth.

Q. Whose equipment is that?

A. Really, I wouldn't venture to say whose it is the way it is made up.

Q. It is not yours, that is, American Laundry Machinery Company? A. No, sir.

[fol. 595] Q. Tell us what it is. It doesn't give us much of an idea.

A. You take rough dry materials and what is known as rough dry service in a laundry, lots of times it is starched and the tumblers beat the starch out of it, and where they can hang it on hangers and put them in these dryers, it doesn't lose the starch, without being beaten out by the tumblers.

Q. You have given about ten items on that page as to the unit cost and total amount of money in it and labor—certainly there is electrician's labor included in that, is there not? A. Well, not exactly.

Q. When you have electric wiring you have got to have electricians?

A. There is some work there; however, any ordinary machinist could do the whole job.

Q. If he were permitted?

A. If he were permitted to do so.

Q. And he is not?

Mr. Murphy: Objected to as not proper cross-examination.

Mr. Hotz: All right, I beg your pardon.

The Court: Sustained.

[fol. 596] Q. Down at the bottom you have steamfitters, too? A. Yes.

Q. What I want to get at, Mr. Witness, is where you got those figures from to put them in there, or did you get them through somebody else?

A. These were gotten through the post engineer.

Q. Turn to page 35. That is a National Marking Machine? A. That is right.

Q. That is not one of your machines? A. That is right.

Q. Where did you get the figures in connection with that sum total?

A. They were gotten—I believe Mr. Crowder got these figures from the people, from the National Marking Machine people.

Q. But you signed up on the exhibit as your estimate?

A. We looked it over to see what it needed.

Q. What it needed?

A. That is, to see what condition it was in. We were just to put it in efficient operation.

Q. Turn to page 57. Did you sign that one?

A. No, we didn't sign that.

Q. That is a Singer sewing machine? A. Yes, sir.

Q. And it says there "Estimate by Mr. Baker, Factory [fol. 597] Representative, Singer Sewing Machine Company." A. I don't know anything about it.

Q. But you have it in your sum total of Exhibit 12, have you not?

A. I imagine that was put in there. If I remember right, it was. That is a part of the equipment.

Q. Turn to page 58. Did you sign that one? A. No.

Q. That is in connection with equipment, sewing machine items with electric equipment there. That you don't know anything about? A. I have nothing to do with that.

Q. But, nevertheless, it is included in the sum total? It is on your Exhibit 12, is it not?

Mr. Murphy: I object to that as not proper cross-examination and not properly reflecting the testimony. The testimony of the witness, as I recall, is that the totals on there are figures that he compiled, and for the benefit of court and counsel, we will have Mr. Crowder cover these other items.

The Court: The testimony shows that all of these are included in totals of Exhibit 12. Why spend any more time on that? This man says that from these items he appraised, but he has testified that it was done with other [fol. 598] gentlemen and the assistance of an adding machine.

Q. The same is true in connection with sheet number 68 as it was in the previous sheets, it is a sewing outfit, an electric affair, and you apparently had nothing to do with that, so far as the appraisal or charge the amount that was necessary to replace it? A. That is right.

Q. And turn to 69, and that same condition exists there, because that is something to sew cloth. Sheet number 70 you put your okeh on that, did you not, and signed it? A. Yes.

Q. What kind of equipment is that?

A. That is sock forms for the use of both ladies' and men's socks, to pull down over them and stretch them and dry them.

Q. That is a relocating job? A. Yes.

Q. You adjudged that to be okeh?

A. We looked at the machine itself and as far as the mechanical part of the machine, it is all right. As far as relocation, it naturally was removed by the government and naturally has to be restored to its original location.

Q. Have you had a great deal of experience in moving [fol. 599] machinery around from one portion of a plant to another? A. Yes, sir.

Q. You have done considerable of that, have you?

A. Yes.

Q. In what instances, for example?

A. I have done this type of work since 1922 and put in several years with the American Laundry Machinery Company doing this type of work.

Q. I am talking about one big piece of machinery from one part of a building to another?

A. Yes, I have. I have moved machines that weighed seventeen and eighteen tons in a building.

Q. Is that done with equipment that you get in the locality?

A. Yes. You mean you move that with equipment that you would have on hand or in the locality?

Q. In the locality. Not with American Laundry Machinery equipment. They have no special machinery for that?

A. We have one machine we can move. As a general rule we get it locally and sometimes we ship it out from the factory. It is what is known as a gantrey, but that is hardly ever done. We generally get those things locally.

Q. On Item 72, that is one of those handkerchief ironers [fol. 600] you talked about? A. That is right.

Q. And that was stored out at Fort Omaha, wasn't it, according to your report, and I want to know how you know it was stored out at Fort Omaha? Did you go out there, or did they bring it back? What do you know about it, of your own personal knowledge?

Mr. Murphy: Objected to as incompetent and immaterial where it was stored, the exhibit disclosing the examination and estimated repairs. I don't see that it is material where it may have been stored.

The Court: This is cross-examination and it might be competent in cross-examination for many reasons: to test his memory; to understand how he inspected it or if he saw it and under what conditions. All these things are proper. Overruled.

A. Everything that was stored at Fort Omaha was brought in.

Q. While you were making your examination?

A. That is right.

Q. Look at the bottom of that sheet 72. It said there, in the first instance, "Fluffer is stored at Fort Omaha" and then afterwards it was changed and said "Fluffer was stored at Ft. Omaha now stores on 1st floor Kim- [fol. 601] ball Laundry" and the part "now stores on 1st floor Kimball Laundry" was apparently added. What I want to know, was that brought down while you were doing the job?

A. All that stuff—the laundry said that was all of it.

Q. Is it connected up or is it in a pile of parts?

A. It is not connected up as far as I know.

Q. As I understand it, you were there about February 15th? A. Well, it was around that time.

Q. 1946?

A. These here are dated and it is February 12, this one here happens to be on the top. That one there happened to be the 13th of February.

Q. You were there, I think, for four days?

A. Four five days or more.

Q. You do have a time sheet on that? A. Yes.

Q. You could give us the exact number of hours spent?

A. I will give you exact hours and everything.

Q. Maybe you had better do that. On sheet 83, is that part of your equipment? It is a Tiltor Shirt Front Press.

A. 83, you said?

[fol. 602] Q. A Tiltor Shirt Front Press on sheet 83 of Exhibit 10? A. Yes.

Q. Does that equipment have many parts to it?

A. It has considerable working parts, yes.

Q. Did you examine them all?

A. We examined the machine and operated it.

Q. Who puts that machine out?

A. American Laundry Machinery Company.

Q. Now go to page number 125. That is an American Tiltor Press. Is that the same type?

A. That is the same type. Just a minute—yes.

Q. And on that you have an item of $33.03. In the previous one you did not have anything as restoration cost or repairs, but on this one you have got $33.03, under facts and figures there set forth on the bottom of the page, and tell us what they are.

A. That is not repairs. That is relocating it and moving it back to the third floor and reconnecting it.

Q. Moving it from one floor to another?

A. That is right, reconnecting it and putting it in operation.

Q. Where did you get the figures for the steamfitter, the electrician and the millwright?

A. It is an estimated amount of ours, like the steam-

[fol. 603] fitter, six hours; helper, six hours; laborer, two hours; electrician, one hour; and millwright, two hours.

Q. And that was filled in by the engineers?

A. That was filled in by the engineers and we assisted them, of course, on some of that stuff.

Q. On how much did you assist them and how much did you not?

A. On this we happened to be familiar with and know how much time it takes to connect one of them.

Q. On page 144, Glover Wool Blocking Table, 36 by 42. That is a piece of equipment that is quite valuable, is it not?

A. I wouldn't say it comes anywhere near to a lot of the equipment in the plant. It is valuable, yes, but—

Q. When sheet 144 was made out, it was located at Fort Omaha, isn't that right? Look up at the top. A. Yes.

Q. At the bottom it says: "Item returned to storage on First Floor at QM (Kimball) laundry on 15 Feb 46."

A. That is right.

Q. Where is it now, so far as you know, the last you saw it?

A. It was still down there. That is, it was still on [fol. 604] the first floor.

Q. With all the other machinery that they brought back from Fort Omaha, is that right? A. That is right.

Q. And this wasn't connected up or anything?

A. No, it was just there.

Q. Going to item 147, two Fantom Fast Markers, and I will ask you to state whether or not that is your equipment; that is, American Laundry Machinery equipment?

A. No, it isn't American equipment.

Q. There are considerable electric parts to that machine?

A. Quite a few, but I would say about a fifty-fifty proposition there.

Q. Did you put in the figures that go to add up $144.90 all told in connection with that matter, or was the mimeographed blank filled out?

A. Those figures were obtained by Mr. Crowder. Of course, we were there only to help him. We were to find out what the trouble was or what was wrong with these machines, or what was required to put them back in operation.

Q. Mr. Newcom didn't sign that, did he? A. Yes.

[fol. 605] Q. Turn to page 149, Wood Chute for Marking Cages, and you signed that? A. Yes.

Q. And it says "Removed by Gov't. Value at time of taking as per L. C. Sholes report." A. Yes.

Q. Is that where you got your information from?

A. As to the value, Mr. Crowder got that figure for us.

Q. Well, you signed it. Did you ever see Mr. L. C. Sholes' report? A. No, I didn't see his report.

Q. Down at the bottom it says "Returned to QM (Kimball) Laundry - 15 Febr. 1946." That was out at Fort Omaha, too, was it not? A. Yes.

Q. It was brought down there while you were at work?

A. That is right.

Q. Was it brought before you started your work, or after you finished your work, or before the report was signed? It was there, of course, at the time you signed the report, but what I am asking you was it after the three or four days of work?

A. While we were working, or I believe it was the fourth or fifth—I don't just recall. That stuff was all [fol. 606] hauled into what they call the first floor.

Q. While you were working? A. Yes.

Q. How many pieces were there?

A. I don't know. I wouldn't even estimate.

Q. And yet you made these sheets and they do contain some estimates as to what has been done with them?

A. It is unwise for me to be up here and guess at anything.

Q. I grant that. Let's go to Exhibit 11. Let's take Exhibit 11 and go through that as fast as we can. You continued the page numbers from Exhibit 10 to 11 so that they are continuous, is that right? A. That is right.

Q. So that we start out with sheet number 150, and so now turn to 151—and they are the same kind of sheets,

blank, and had been filled out in the same form as Exhibit 10? A. Yes, same thing; same form.

Q. That is a Fantom Speed Marker, and that also has electric equipment and so forth on it, is that right?

A. That is right.

Q. Down at the bottom of that page what is stated on [fol. 607] the last line on your exhibit?

A. It says "Soap Room."

Q. One line farther?

A. "Repair Parts Costs from Commercial Firms."

Q. What commercial firms?

A. I don't know. I didn't get that.

Q. You have $113.21? A. I didn't even sign that.

Q. So, you know nothing about that, is that right?

A. That is right.

Q. Whether it is right or wrong, but nevertheless, it was included in your tabulation, is that right?

A. That is right.

Q. We will now go to page 157 and you signed that without any question of a doubt, is that right?

A. That is right. That is a Bock Starch Extractor.

Q. Is that an American Laundry equipment? A. No.

Q. Where did you get those notations on that page "Beyond Repairs when moved from laundry. Not used by Government. No restoration." State whether or not those three phrases are correct?

A. Well, from the word I got, or the way I got it, these weren't used. However, we condemned the machine [fol. 608] as beyond repairs.

Q. You don't know whether it was used or not?

A. I don't even know whether they used it or not. You see, I wasn't here in 1942.

Q. The item was returned to storage on the first floor of the Kimball Laundry Company on February 15th. This item had reached functional obsolescence at time of taking? A. Undoubtedly.

Q. "At time of taking." Do you know what time they are talking about there? A. I tell you, truthfully, I don't.

Q. I don't think so. I don't either. We will go to number 158 washer for blankets, is it not? A. That is right.

Q. And it was taken out to Fort Omaha, apparently. It says so, at least, on the report. I don't suppose you know anything about that, whether it was or wasn't.

A. I know it was brought back here.

Q. Did you ever go to Fort Omaha and see it stored or what was being done with it out there, but when it came back it was being unloaded while you were doing this work? A. That is right.

[fol. 609] Q. Did you examine it for these repairs that are placed on this particular sheet number 158?

A. Yes, we examined it.

Q. You examined it for repairs? A. Yes.

Q. Did you single that one out? A. Well, no—

Mr. Murphy: Objected to as not proper cross-examination and not a fair question.

Mr. Hotz: I will withdraw it.

Q. Was it in the same pile with the rest of the machines that came back from Fort Omaha?

Mr. Murphy: Objected to as not proper cross-examination, there being no evidence any machines were in a pile.

Q. That is, by themselves, on the first floor?

Mr. Hotz: Is there anything before the court?

The Court: Not that I know of. The objection seems to have been confessed and you have started on something else. Let's see what that is.

Q. This is not your machine? A. No.

Q. Were these figures aggregating $45.87 placed by you on that sheet? A. No.

[fol. 610] Q. To be fair with you, were they placed on another sheet from whence this was made, or were they put on by someone else when you signed it?

A. I don't quite understand your question there.

Q. Did you have anything to do with compiling those figures on that sheet? We are talking now about sheet 158 in connection with this blanket washer?

A. I looked over the machine to see if it needed any repairs to the equipment, itself, for efficient operation, so far as relocation and all, and reinstallation and reconnections and all, and the U. S. Government engineers compiled those figures. That is right.

Q. We will jump to 174. That is a water circulator. That is not your equipment either, is it?

A. No, that isn't our equipment.

Q. You signed that sheet and put your okeh on it?

A. That is right.

Q. And sheet number 175 is a Bishop Starch Mixer?

A. That is right.

Q. Is that a big piece of machinery? A. No, it is small.

Q. Small—what do you mean—how many gallons?

A. This one here is, if I remember right, this is a fifty gallon.

[fol. 611] Q. Are you familiar with a Bishop Starch Mixer?

A. The American sells that equipment, the Bishop equipment.

Q. But you didn't sell this particular machine?

A. I wouldn't say that.

Q. You passed that as okeh? A. That is right.

Q. There is a drinking fountain you passed as okeh?

A. Where is that at?

Q. I beg your pardon, page 176. A. Yes.

Q. And of course, you don't sell that and you don't know whether that is a part of the plumbing system of the building or you didn't go into that?

A. No, it wouldn't be part—if it is a drinking fountain it wouldn't be a part of the plumbing at all.

Q. But it makes up one item in this report?

A. That is right.

Q. And sheet number 177 is 64 steel lockers?

A. That is right.

Q. Those were passed by you as okeh?

A. No, I didn't sign that. I didn't have anything to do with that.

Q. Let's take sheet number 179. That is a hat blocking table, 46 x 72 with 1-Doring Bros Luhring Iron, and just [fol. 612] read the rest of that equipment?

A. "Elec. 1 Advance Brim Iron & 1 Electric Flanging Iron & 1 block spinner."

Q. That is not your equipment?

A. No, that is not American equipment.

Q. It says in that that the "'Above costs include all restoration costs for all items listed in L. C. Sholes survey for Item 2." Do you know anything about that including all items? Did you check about that to see whether or not that statement was correct from any source, or did you just get what the engineers told you?

A. We went over the equipment and informed them, which we were hired to do, to check this stuff, to see what they needed, and inform them as to what it needed and he obtained the costs, other than the American equipment, and we obtained that through our company.

Q. And you wrote in and got that from them?

A. That is right.

Q. When did you get that price list from your company?

A. That was obtained, I think, last Tuesday or Wednesday.

Q. Just recently you got that? A. Yes.

[fol. 613] Q. And that simply stated the cost, for instance, of a certain type of bearing, the cost of a certain type of screw or bolt? A. That is right.

Q. I notice you have a lot of thermometers. I think you have at least a dozen or more thermometers at $30.00 each? A. That is right.

Q. And where are they used?

A. Inside the washing machine.

Q. They had to be all brand new?

A. Well, they were what plaintiff thought were damaged and they were off, too, to a certain extent, and we replaced them and marked them as replacements. They were off some.

Q. Sheet 180. That is a Hawkeye Crown Ironing Machine, and is it part of your equipment that you have personal knowledge of it, or not?

A. It is part of the equipment, but it is not American equipment.

Q. So, the figures that are on there as to these costs were obtained from somebody else? A. That is right.

Q. Not by you? A. That is right.

[fol. 614] Q. And sheet number 195 in Exhibit 11—the copy I have is pretty dim and I will ask you if you will

tell me what that is. I think it is a spotting board.

A. It is a Cissell Spotting Board

Q. What is that?

A. That is a board made up on a stand with a monel metal screen over the top of it and you spot silks and things of that nature on it, stretch it over this and spot it.

Q. There is an electric light down underneath?

A. It is the way they can see spots in this silk and remove it, and most anything that you want to spot.

Q. Something like egg candling devices?

A. Similar thereto.

Q. Is that part of your equipment?

A. We sell that equipment, but this is not American.

Q. So that you didn't make up the cost items on this?

A. That is right.

Q. The $30.85, somebody else obtained that?

A. That is the relocation cost.

Q. Number 199. That is two pedestal electric fans, and you put your name on that and passed it as okey?

A. Yes, we looked at those.

[fol. 615] By pedestal electric fan, is that one of those fans that sit on the floor and are five or six feet in the air? A. Yes.

Q. They have a lot of them, do they not?

A. There are several down there.

Q. And of course, you don't sell them?

A. We sell them now. We didn't at the time.

Q. That installation that was down there was not the American Laundry? A. No.

Q. We will now go to page 204, International Time Clock. Did you write your name and then strike it off of that exhibit? A. Yes, that was stricken off there.

Q. The principal part of the time clock is to know how to punch it? A. That is the main thing.

Q. And so, the estimate made on there of $46.00 was put there by someone else? As a matter of fact, it says "Estimate by John Petkus"?

A. I think it is Petkus. It looks like Petkus.

Q. You take no responsibility for that so far as the estimate that is there? A. No.

[fol. 616] Q. There is a Glover Velvet Blower on page 205, is that right? A. That is right.

Q. That is a Fort Omaha item? A. That is right.

Q. And then it was transferred back to the laundry while you were doing this work, is that right? A. Yes, sir.

Q. I think I asked you before, at what stage of your survey, as you call it, on these blanks, surveyed by Mr. LaTurner, at what stage in the progress of your survey during this four days or a little more did this equipment come back from Omaha? A. What stage?

Q. Yes, the first, second, third, or did you go back and do it after you had finished the job, or how was that handled?

A. They brought that all in during the time we were working there. When part of it was brought in, I couldn't identify as to when each article was brought in, because it was brought in over a period of those days.

Q. Of course, you don't undertake to say what the condition of it was when it went out?

A. No, I wouldn't say that.

[fol. 617] Q. And therefore, in connection with that page number 205 in Exhibit 11, $29.27, you obtained the figures from someone else. When I say "figures," the amount in dollars and cents you got from someone else?

A. We checked the machine over to see whether or not it was all right itself.

Q. I understand that, but the amount it would cost to put it in shape, the figures in there someone else supplied to you?

Mr. Murphy: Objected to as not proper cross-examination, there being nothing in that exhibit for the cost of putting it in shape. The figures are for relocation.

The Court: Let us keep our record as we go along.

Mr. Hotz: I will withdraw the question.

The Court: I will sustain the objection. We will take our morning recess at this time, and I wonder if you can not sort of bunch them up and help us along.

Q. Turn to page 206 of Exhibit 11, that was a Jordan Valve Steam Gun that also came down from Fort Omaha, did it not?

A. Yes, Jordan Valve Steam Gun from Fort Omaha.

Q. At this point, let me ask you this general question: How many machines were there that came down from [fol. 618] Fort Omaha and were placed on the first floor of the Kimball Laundry Company while you were doing this work?

A. I couldn't answer that from memory. I would have to check that up.

Q. Do you recall that any of them were in such a state that from a practical standpoint they should not be repaired? A. Will you repeat that question?

Q. From a practical standpoint, did you find them in a condition that they should not be repaired?

A. There were some, yes. So far as repairs are concerned—

Q. I am speaking now from a practical standpoint. Of course, you could repair anything. It would cost more to repair it, but from a practical standpoint did you find a number of those machines in that condition?

A. Well, no, we found all of them which could be repaired.

Q. But whether it was a practical thing to do or not wasn't just exactly what was asked of you. You were asked what it would cost to repair that machinery as you found it?

A. The way I understand that question is, we will [fol. 619] say a machine cost $300.00. If it cost $400.00 to repair it and put it back in operation, that would be impractical?

Q. Well, yes, but not quite that extreme. Perhaps you would not be justified even if they were $100.00, is that true? A. Well, yes, there is some truth in that.

Q. Did you make a list of those machines that were there? You said you couldn't find it offhand—I mean the machines that came from Fort Omaha that were brought back?

A. We have a list. The U. S. Engineers; I don't have that myself, no.

Q. Do you know whether or not they are all included in these Exhibits 10 and 11?

A. As far as I know, they are.

Q. They would be, you think? A. Yes.

Q. And we would find them where it says up at the top "Fort Omaha," or "Present Location Fort Omaha," and then an asterisk, "*Item returned to storage on first floor QM (Kimball) Laundry on 14 February 1946," is that right? Have I got that straight? A. That is right.

Q. Turn to page 207 now and that is one of the items [fol. 620] that came from Fort Omaha, is that right?

A. That is right.

Q. It says $20.55 to relocate that Glover Steam Wool Blocking Table that had been at Fort Omaha and brought back to the laundry? A. That is right.

Q. You don't know whether or not any of that equipment was used for laundry and dry cleaning at Fort Omaha? A. I understand it wasn't.

Q. Go to page 211. That is another Glover Trouser Former, a stretcher for pants, isn't that right?

A. Glover Trouser Former.

Q. Did you examine that machine personally?

A. Well, I looked at the machine. Mr. Newcom went over it himself. I looked at the machine. I can't say that I personally examined it all over, myself; no, I couldn't say that, but I looked to see that it was done.

Q. And with your okeh, and it has "No repairs required"?

A. It was all right as far as repairs. As I stated before, I was hired to come and see what repairs were required for these machines.

Q. And the figures at the bottom of the page, $19.00, are for relocating it and attaching the steam fittings and so forth to connect it up?

[fol. 621] A. That is right.

Q. That is not your equipment, either?

A. That is not American equipment.

Q. Turn over to page 237, Glover Dress Dryer, and that is not your equipment, is it?

A. No, that is not American equipment.

Q. And all that was put in there was to reconnect it, steamfitter's work, and so forth, and put it back appar-

ently where it was originally located on the fourth floor, and it was stored in the women's locker room, isn't that right? A. That is right.

Q. According to your statement, did you make that investigation? A. Yes.

Q. You got the figures on the bottom of that page from the engineers; that is, the dollars and cents?

A. That is right.

Q. Turn to 239. That is a Hoffman Tumbler. Is that part of your equipment?

A. No, that isn't American equipment.

Q. The expense there largely is in connection with a steamfitter and helper, $18.20 in expense. The point I am getting at is that that figure was furnished by somebody else, but you signed the report?

[fol. 622] A. We were hired to come here to investigate this equipment, to see what it needed, which we did as thoroughly as possible and to our best knowledge. We gave the engineers the information and the time, the hours required to do this work.

Q. And they then compiled the figures?

A. They then compiled the figures.

Q. On page 240, that is not your equipment, either, is it? A. No, it isn't. That is Hoffman Company.

Q. And let's go along a little faster now with your explanation. Sheet 241. That is a Filpro Dry Cleaning Unit 140-F Type - Hoffman, installed in 1941?

A. That is right.

Q. And sheet number 242 is a washer, dry cleaning washer for dry cleaning, is it not?

A. That is right, a Hoffman Dry Cleaning Washer 140F Unit.

There are a lot of marks on that, pencil notations, and it says: "4 Door hinge pins 4 Cylinder door latches, tongue." Does your exhibit have any marks on it?

A. No, it doesn't

Q. What is the sum total you have?

[fol. 623] A Sum total is $13.60.

Q. What is this down at the bottom "by telephone from J. Fitpold, U. S. Hoffman Machinery Co. Chicago

on March 1, 1946 C. R. Crowder"? Do you know anything about that?

A. That is where he obtained these prices for these parts. He phoned in to Chicago.

Q. And sheet 243, is that a tub?

A. It is a washer of the same type and size.

Q. And 244, that is a dry cleaning unit. That is not your equipment, either, is it? A. No, it isn't.

Q. And page 245, Auxiliary Tanks, Pipes and Control Unit for the Hoffman unit? A. That is right.

Q. Did you put the words in there "No Restoration"?

A. "No Restoration" means that its original location wasn't moved or anything of that sort.

Q. And page 250, that is a drinking fountain. "No Restoration" it says on that one, and 251 is a McCreary Blanket Brusher with wool and nap catcher—motor driven. Your name is signed to that.

A. That is a McCreary Blanket Brusher and nap catcher, motor drive.

Q. There is an item of $12.60 that you have in con-
[fol. 624] nection with a sheet metal worker and helper, and down at the bottom it says "QM will clean up." Did you put your name on that? A. I did.

Q. Sheet 267, Reliable Comb. drum and Cage fur cleaner? A Reliable Comb. drum and Cage fur cleaner.

Q. What is that?

A. Just a combination of a drum and made like a cage, similar to a squirrel cage. I would say it is more or less to dust out the furs.

Q. At page 268, that is a Baker Ice Machine?

A. Yes. I didn't sign that, though.

Q. It says the total is $77.79, and on the bottom of the page, or the sheet number 268, it says: "Complete check of system pending repair of compressor. If shaft is bent due to excessive pressure, complete check of compressor will cost extra." Did you have anything to do with that? A. No, nothing to do with that.

Q. 269, Peerless Gem Paper cutter. That is not your equipment, either? A. No, sir.

Q. But you signed it?

A. We looked it over and signed it and it was all right.

[fol. 625] And that was a millwright job? A. Yes.

Q. Are you a millwright yourself?

A. Well, I could be. I am qualified.

Q. Most of the items on relocation had the name millwright in there, practically every one of them on relocation, isn't that right? A. That is right.

Q. And those are big, substantial items of expense?

A. That is right.

Q. I want to ask you in connection with these Exhibits 10 and 11, Mr. Witness, the page number and item number do not correspond, do they?

A. The page and item number do not correspond, no.

Q. What did you take into consideration in an item number? A. What is an item number?

Q. Yes, for instance, let's take a specific example of the exhibit you have in your hand, and that is page 184, sheet number of Exhibit 11, and it says "Item No. 7." There are one, two, three items on that page. It says vacuum valve, screen grid for buck, and new table. What is that? Is that all one item?

A. No, that is different items there on that. This [fol. 626] page—in other words, different item numbers of these pages opposite of the item as shown, I believe. —I don't recall the exhibit number, but on the prints of the building, the prints of the floor plan, this page number is what they go by in rotation for this purpose.

Q. The reason I am asking you the question is this, that we had Exhibit 21, which was offered in evidence and it contains an itemization and total of 594 different items and I was trying to get from you, so that we could check back and find out whether or not it was the total number of items, or sheet numbers.

A. Oh, no, that is on the sheets.

Mr. Murphy: If I may make a brief statement to counsel, I think it will save time. As I have repeatedly stated, we have another witness who worked in compiling this and we will tie up by him these numbers, so that counsel can identify every item on his Exhibit 21. That was

done by Mr. Crowder, as I understand, who will be our next witness.

Q. Were you furnished with a list of the quartermaster of the items of machinery and parts that were moved from the laundry to Fort Omaha?

[fol. 627] A. Yes, we had that.

Q. You have that list?

A. I don't have it now, but I did have it.

Q. I understand they furnished you that and do you recall there were 178 items on there?

A. I don't remember.

Q. Did you check the machines that were brought with the list? A. Yes.

Q. Did you do that? A. No, I didn't do that myself.

Redirect Examination of Denton J. LaTurner by Mr. Murphy:

Q. To clear up a couple of matters and items, did I correctly understand that when work was to be done on machines other than American Laundry, or by local millwrights or electricians, that you, from your experience and in your estimate, determined the number of hours and then the engineers figured the hourly pay and the amount of money for that number of hours?

A. That is right.

Q. And in items not involving American Laundry machinery, the engineers, and not you, obtained the cost of the items from that particular factory?

[fol. 628] A. That is right.

Q. That the two of you, you and Mr. Crowder and Mr. Newcom, worked together on all of these items?

A. That is right.

Q. And a number of these sheets are not signed by you. In those instances, as I understand it, you had nothing to do with that particular sheet?

A. That is right.

Q. And there are other sheets you did sign because you had checked and furnished part of the figures and then additional figures on that sheet were furnished by the engineers, obtained by them? A. That is right.

Q. Did you check all of the machinery and laundry equipment as to need for repair, irrespective of whether it was American Laundry Machinery or others?

A. That is right.

Q. And determined what repairs are needed? A. Yes.

Q. You are a mechanic and have been in that work?

A. Since 1922.

Q. And have you handled the moving about in a building and from building to building many items of machinery? A. Many of them.

Q. Laundry machinery and all kinds of machinery? [fol. 629] A. Yes, sir.

Q. Are you familiar with what is necessary to move machinery and to connect it up and to fasten it to the floor and generally install it? A. Yes, I am.

Q. And do you know how long it takes to move a certain piece of machinery you see from one certain spot to another spot? A. Yes.

Q. I take it there were other items of equipment down there that you didn't get any figures on?

A. That is right.

Q. And someone else did, as far as you know?

A. As far as I know, yes.

Q. And in your computation on Exhibit 12, did you include those items that you yourself obtained or furnished? A. This item 12 is figures of our equipment.

Q. I will hand you what the reporter has marked Exhibit 12-A and ask you if you know what that is?

A. That is grand totals of all of the equipment.

Q. Including yours and what Mr. Crowder, or other engineers, obtained separately? A. Yes, sir.

Q. And I will hand you what the reporter has marked [fol. 630] 12-B and ask you if that is simply a carbon copy of 12 and 12-A, which have been cut in two, separating the two? A. That is right.

[fol. 631] ROBERT J. ALEXANDER, having been previously produced and duly sworn on behalf of the *Government*, was recalled for further

Cross-Examination by Mr. Hotz:

Q. When you were on the stand the other day I asked you to check in connection with the estimate on the paint, whether it was one or two coats? A. Yes, sir.

Q. Did you do that?

A. I talked to the contractor, Mr. Rorick, this morning.

A. Mr. Rorick was the general contractor? A. Yes.

Q. And he stated it was two coats, but he was having the job sublet, but he didn't have any figures, and Steinheimer is the man I want to know about, because he was the man to deal with, because Steinheimer made the figure based on one or two coats of paint?

A. I can tell you what Mr. Rorick told me.

Q. I know what Mr. Rorick told you and what Mr. Rorick told us.

The Court: Call the gentleman as your witness. We can not make any headway. He got his information from Mr. Rorick.

Redirect Examination of Robert J. Alexander by Mr. Murphy:

Q. Did you, since the session here last week, make a recheck on this paint proposition?

A. Yes, sir, I have gone into it very thoroughly.

Q. Did you personally check with the other subcontractor that Mr. Rorick had mentioned?

A. No, sir, my dealing having been directly with the general contractor, Mr. Rorick, who in turn has dealt with his subcontractor.

Q. When you asked Mr. Rorick in the first instance for an estimate, what did you ask for?

A. I put it to him in two ways, to figure the paint, or have the paint figured, as the case might be, based on two coats of lead and oil, or as an alternative thereto, a complete wash job plus one coat of lead and oil paint.

Q. Were you furnished with two estimates from two subcontractors?

A. Mr. Rorick, after the original examination of the building by he and myself, took two painters through

the building and received from them two subbids on painting. In his bid to the Government he used the higher of the two subbids which he received from those two paint subcontractors.

Q. What was that bid that he used?

[fol. 633] A. The money amount of it?

Q. Yes? A. $5995.00.

Q. From whom did he obtain the other bid?

A. From a local painter, Mr. Otto F. Schaap.

Q. What was the amount of that bid? A. $5900.00.

Q. Just a little below the other bid of Steinheimer?

A. That is correct.

Q. Have you since last week carefully checked and figured from your knowledge and experience the cost of this paint job on these various bases of washing and one coat of lead and oil, or two coats of lead and oil, or an enamel and gloss finish?

Mr. Hotz: Object to that as having been asked and answered and improper redirect examination. He gave those figures to show the difference in reference to gloss and enamel finish and increased it by 20%, as I recall it.

The Court: I understand that the question is that since that time, or since he gave the information upon which he based that opinion, that he made another check. Is that the question?

Mr. Murphy: That is.

The Court: This is a matter of bringing it up to date, [fol. 634] or correcting any other statement he may have made.

Q. Go ahead and tell us just what you did and what you found about this paint proposition?

A. The figure which I gave you as a part of the Government's estimate for this work covered by Mr. Rorick's original bid, included a figure of $6100.00 for two coats of lead and oil paint, in addition to another figure in the amount of $994.00, I believe, for a complete wash job prior to the paint application. I made no Government estimate for washing and one coat of paint. In order to assure that the job was done in correct style, the Government estimate contemplated washing the ceil-

ing particularly, and the walls generally, plus two coats of lead and oil paint. Since last Friday, based upon paint prices in quantity lots, which were quoted to me by two separate, reputable paint dealers here in the City of Omaha, I have made further estimates, and I find to apply one coat of primer and sealer, plus one coat of semi-gloss enamel, would be estimated to cost $6600.00, and I further found that to apply one coat of primer and sealer, plus one coat of gloss enamel, would be estimated to cost $7600.00. I would like to further qualify [fol. 635] these figures by pointing out again that that is not regular Government estimated practice or base cost, which included contractor's regular costs, contractor's profit and overhead, but to which we added a 15% contingency figure and the 15% has not been added to the figures I have given.

Q. Did you make any further check on this other subcontractors bid?

A. After last Thursday or Friday, Mr. Rorick solicited from his first painting subcontractor, the one whose figure he had used, a further figure to cover the same work and as he had previously figured on by substituting therefor an enamel wall finish in lieu of lead and oil. The bid he received was not submitted in accordance with his instructions and therefore was disqualified. Mr. Rorick then used the second painting subcontractor's bid and solicited from him a new bid based upon the same instructions as he had previously given, except that in lieu of washing and one coat of lead and oil the bid would include two coats, an enamel undercoat and an enamel, and he received and has submitted to me a letter bid from the second painting subcontractor.

Q. In what amount?

[fol. 636] A. The bid would increase the original bid which was submitted in the amount of $1490.00.

Q. May I see that letter a moment? I will hand you what the reporter has marked Exhibit 13 and can you state if that was the original bid of the paint contractor, Mr. Schaap?

A. This letter accompanied by that bid form constitutes the original subbid, yes, sir.

Q. When you say this "form" you mean Exhibit 15? A. Exhibit 15, yes.

Q. But at that time did Exhibit 15 have the last two figures that are now on there?

A. They did not. Those were, in my presence this morning, added by Mr. Rorick.

Q. I will hand you Government's Exhibit 14 and ask you if that is the additional figure or bid submitted by the same contractor covering this change from lead and oil to enamel and gloss finish paint? A. It is.

Q. Handing you Exhibit 15, which you stated was first attached to the original bid, I will ask you if the figure thereon, $5900.00, was the original bid that you testified about previously? A. It is, yes.

[fol. 637] Q. And the figure $1490.00 thereon in pencil, is that taken from Exhibit 14, or the additional bid submitted by the same contractor? A. It is.

Q. Then, what is the total as shown in pencil figures on Exhibit 15 is the entire job by this painting contractor, including an enamel paint? A. $7390.00.

Mr. Murphy: Government offers in evidence Exhibits 13, 14 and 15.

Mr. Hotz: We raise one objection to the exhibits because it lacks the specifications. He says it "covers all of the work to be done as specified on the plans and what you have outlined to me when I was in your office" and it is addressed to Rorick Construction Company, and I therefore object to them as merely hearsay and rather self-serving, because they are not—we can't tell anything about it thout the specifications and the information given by the witness doesn't help any in regard to what was in the witness' mind.

The Court: Overruled. Anything you wish to obtain from the witness you may obtain from cross-examination.

[fol. 638] Government's Exhibit 13, found in Volume IV, at Page 1112.

[fol. 1112] Gov't Ex. 13 (Received)

OTTO F. SCHAAP
Contracting Painter
The Finest in Spray Painting
Telephone Kenwood 9160
Modern Equipment Means Better Service on
Your Painting Problems
4342 North 40th Street—Omaha 11, Nebraska

Rorick Const. Co. Feb 14 1946
Omaha Nebr.

Dear Sirs:

The enclosed proposal is for the painting of the interior of the Kimball Laundry. It covers all of the work to be done as specified on the plans and what you outlined to me when I was in your office.

If awarded this work, I will agree to complete it in 20 to 25 workings days, and use only the specified materials applied by union labor.

Materials are somewhat hard to get, but in this case I will have no difficulty in getting enough material to do the job. I have over 200 gallons of lead and oil in stock, and any one of three material firms has agreed to furnish me with enough paint and sundries to do the job completely.

Hoping the above meets with your approval, I remain

Sincerely,
(Signed) Otto F. Schaap

Full Insurance Coverage For Your Protection,
Workmen's Compensation, Public Liability,
Personal Property Damage

Government's Exhibit 14, found in Volume IV, at Page 1113.

[fol. 1113] Gov't Ex. 14 (Received)

OTTO F. SCHAAP
Contracting Painter
The Finest in Spray Painting
Telephone Kenwood 9160

Modern Equipment Means Better Service on
Your Painting Problems
4342 North 40th Street—Omaha 11, Nebraska

Rorick Const. Co. March 11, 1946
Omaha, Nebr.
Dear Sirs:

In compliance with your request, the following figures are for the Kimball laundry job. The only changes in the specifications are to use one coat enamel undercoat and one coat enamel in place of one coat of lead and oil. This change of material specification is for all the painted ceiling and wall surfaces on the original plan. The added cost of doing the work in this manner will be the sum of One Thousand Four Hundred Ninety Dollars. $1490.00.

Hoping the above meets with your approval, I remain

Sincerely,
(Signed) Otto F. Schaap

Full Insurance Coverage For Your Protection,
Workmen's Compensation, Public Liability,
Personal Property Damage

Government's Exhibit 15, found in Volume IV, at Page 1114.

[fol. 1114] Gov't Ex. 15 (Received)

OTTO F. SCHAAP
Contracting Painter
The Finest in Spray Painting
Modern Equipment Means Better Service on
Your Painting Problems
Full Insurance Coverage For Your Protection,
Workmen's Compensation, Public Liability,
Personal Property Damage
Phone KE. 9160 4342 No. 40th Street Omaha 11, Nebr.

Proposal Rendered to Rorick Const Co.
Work to be done at Kimball Laundry Interior

After inspecting the Kimball Laundry Building, I hereby make the following proposal for doing the painting work as per the plans and specifications furnished me.

I will furnish all material, labor, tools, equipment, and insurance protection necessary to the completion of the

job for the sum of Five Thousand Nine Hundred Dollars

$5900.00
1490.

7390

O. F. Schaap (Signed)

Recross-Examination of Robert J. Alexander by Mr. Hotz:

Q. Did you have any written specifications that were submitted to the bidders on this painting?

A. No, sir, we prepared no written specifications. We received informal bids only.

Q. You had a bid from Mr. Steinheimer in the first instance?

A. My bid was from the Rorick Construction Company.

Q. Do you know who Mr. Rorick was depending upon in his subcontractors' bids for his estimates to you?

A. Not until he had submitted his written bid to me.

Q. Then you knew it was Mr. Steinheimer?

A. I understood that verbally, yes, sir.

Q. And then you got into this thing and checked into it a little bit yourself?

A. After the contractor and I had gone over the property and I solicited his bid and prepared an independent government estimate.

Q. You got a new man to come in and make the bid [fol. 639] for the painting? I am talking now about Mr. Schaap. Is that right?

A. No, sir. He is not a new man. Mr. Rorick solicited simultaneously two subbids.

Q. That is right, he did, for a $90.00 less bid than the Steinheimer bid?

A. I believe that is correct, yes, sir.

Q. Do you remember when you were on the witness stand before I asked: Would you be willing to check to determine from Mr. Steinheimer and inform yourself through Mr. Steinheimer and Mr. Rorick whether or not

that wasn't a one-coat job that Mr. Steinheimer had figured on in submitting to Mr. Rorick, and did you do that?

A. I checked with Mr. Rorick, as I stated this morning.

Q. But you didn't check with Mr. Steinheimer?

A. It seems to me, Mr. Attorney, my capacity as a Government engineer should be with a prime contractor and not with a sub.

Q. I am not arguing with you, Mr. Witness. I am just asking you.

A. No, sir, I did not check with Mr. Steinheimer.

[fol. 640] Mr. C. R. Crowder, produced and duly sworn as a witness on behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. Give your name to the Reporter, please.

A. C. R. Crowder.

Q. Where do you live?

A. 1324 South 52nd, Omaha, Nebraska.

Q. What is your business or profession?

A. I am an engineer employed in the mechanical and electrical section of the United States Engineers office, Missouri River Division, Omaha, Nebraska.

Q. How long have you been stationed here in Omaha?

A. Two years.

Q. Have you had any training in school in enginering work?

A. Yes, I received a degree in engineering from the Georgia School of Technology, Atlanta, Georgia.

Q. What year? A. 1926.

Q. Have you been engaged in engineering work since that date? A. Yes.

Q. How long have you been with the army engineers?

A. Over four years.

[fol. 641] Have you had experience in checking various laundries, army laundries? A. Yes.

Q. Did you draw plans and supervise the plans of any particular government laundry? A. Yes.

Q. Which one?

A. A certain portion of the laundry at Camp Carson, and dry cleaning plant.

Q. Have you supervised the construction of other army mechanical buildings and industries and hospitals and things of that sort? A. Yes.

Q. Are you familiar with prevailing wage levels in Omaha? A. Yes.

Q. Is it part of your work and your business to estimate costs of construction and repair of buildings and machinery? A. Yes.

Q. Is that really what your work is to a large extent?

A. To a large extent, my duties are consulting work, which consists of preparing estimates for performing mechanical and electrical installations; checking the designs of machinery which are a part of these installations; [fol. 642] setting up estimates for the proper amount of funds required to perform these installations in a correct manner; inspection of various mechanical and electrical installations throughout the division and territory.

Q. Have you been doing that work for the past four years with the army and similar work prior to that in private industry? A. Yes.

Q. Did you supervise in recent months the checking, surveying, examining and estimates of repair, removal and all of these items entering into the quartermaster laundry building, machinery and equipment here in Omaha? A. Yes.

Q. And you have been in the courtroom the last few days, at least during the testimony of the government witnesses in this case? A. Yes.

Q. Was that work done under your general supervision with Mr. Pargett, Mr. Alexander, and these American Machinery laundry men, and these other witnesses?

A. Yes.

Q. Did you go with them and compile final statements showing the itemized items of cost and what these costs [fol. 643] pertained to? A. I did.

Q. Did you personally obtain some of those items and figure some of them yourself? A. I did.

Q. Tell us a little of what you did, generally. Did you go down to the building to check the building machinery? Just what did you do first, and then from there on, generally?

A. We started on this project of restoration, as we termed it, on or about December 15, 1943, and have been constantly engaged in fact-finding operations in the way of estimates, surveys and checking through the detailed pertinent items thereto in view of finding the correct costs for the necessary repairs, labor, relocation and restoration for the laundry machinery, laundry and dry cleaning machinery, laundry and dry cleaning fixtures, and miscellaneous items pertinent thereto as found throughout the building.

Q. Did you personally go through the building and examine the machinery and equipment? A. I did.

Q. Did you determine the grand totals with the help and cooperation of your two workers who have testified [fol. 644] here on the stand? A. I did.

Q. I will hand you just for reference for the moment, Government's Exhibit 17, in which there are some items not yet testified to here. Did you estimate the fair and reasonable cost of cleaning and draining the elevator pit and painting the channel supports?

A. Yes, under my supervision. I checked it. I had it prepared under my supervision.

Q. What is the fair and reasonable cost of that item?

Mr. Hotz: Is there anything I could be looking at?

Mr. Murphy: That is 1 (d), on the first page.

A. 1 (d). That would consist of correcting a condition at the bottom of the elevator pit where water has accumulated, to prevent a condition which has been found to exist due to improper drainage.

Q. What is the fair and reasonable cost of repairing that item? A. $12.48.

Q. Did you check and estimate the fair and reasonable cost of some work on the roof of the penthouse, flashing and collar for three steam exhaust lines? That is the next item. A. I did.

[fol. 645] Q. What did you find to be the fair and reasonable cost of doing that work?

A. $30.15 is the total cost for those repairs.

Q. Item 2 (a)—

The Court: What did item 2 consist of?

Mr. Murphy: Structural steel. Item 2 (a) Repairing metal door over chute to basement.

The Court: Have him so state.

Q. Can you tell us the fair and reasonable cost of that item?

A. Repairing metal door over chute to basement, $9.45.

Q. Turning to the next page, and by the way, I note that in Exhibit 17, which is your Exhibit D, there are some items listed and then no figure after them. What does that indicate?

A. That indicates certain equipment in the building which has been checked and found to be in satisfactory and efficient operation.

Q. Now, item 7. Heating and Plumbing. Did you investigate those particular items and determine the fair and reasonable cost of the repairs, after first, of course, determining the necessary repairs? A. I did.

Q. Will you tell us what they were and what the fair [fol. 646] and reasonable cost is?

A. Item 7 is headed up as Heating & Plumbing. The first item, 7 (a), to remove water and gas pipes service to emergency room and Prisoner of War lunch room, fifth floor, for a total cost of $31.00. Item 7 (b), reconnect steam lines to hot water generator as per original hook-up for 135 pounds per square inch—there should be steam operation added after that—total for that item, 7 (b), $731.40. Item 7 (c), replace galvanized hot and cold water lines where patched by government. There is a matter of explanation to that. That is figuring on new pipe between all fittings where the lines have shown leakage, with new pipe of the same grade and weight and type, between the fittings.

Q. I notice you have two figures there, cost, and then fifty per cent, and then over at the right, fifty per cent of the original item. Explain that.

A. The total cost of item 7 (c), replace galvanized hot and cold water lines where patched by government, is $478.69. We have that set up on a fifty per cent pro rata cost to the government, which would, on that basis make a net amount of $239.40.

Q. Why have you taken fifty per cent only charged [fol. 647] to the government on that item?

A. For the reason that in doing this work, we will have considerable new material in the installations due to the type of piping work that are not absolutely required at this time.

Q. You mean you will be replacing some pipes that have been in that building since it has been constructed, with new pipe?

A. Yes, and based on an average life of ten years for the galvanized hot and cold water lines under the type of service that they are now operating under, and we estimate that the government is liable for fifty per cent of this repair cost.

Q. All right. The next item.

A. Item 7 (d), repair deteriorated pipes, unit heaters and other miscellaneous heating equipment. The repair cost is stated as $319.40, and it is my considerate opinion that the government should stand forty per cent of this total repair cost, or a net figure to be borne by the government of $127.76.

Q. Now we come to item 8, and to avoid repetition, I will let you testify what it is and what it involves and what your figure is and how you arrived at it.

A. Item 8 is a boiler, Kenny boiler, water tube, 225 [fol. 648] horsepower, stoker fired. Item 8 (a), listed thereunder, reads: "Repair existing boiler, with new boiler crown sheet, 3 new firebox plates, and miscellaneous" items, which include necessary stable plates; that is, boiler plates, and so forth, as required to repair the damaged parts in this boiler.

Q. How old is that boiler?

A. Well, according to the information available from all records, the boiler was installed in 1924.

Q. What in your opinion is the normal life of that boiler under normal use? A. The normal life?

Q. Of that particular boiler under normal use in that laundry?

A. The life of a boiler of that type used in a laundry will range between twenty and thirty years. The average would be, I would say, twenty-five years, in my considerate opinion.

Q. Are these substantial repairs? I don't know much about a boiler. Are these substantial items of repair you have mentioned here?

A. Yes, these figures have been prepared bearing in mind that in the damage of this type there will be certain unforeseen contingencies that may develop when [fol. 649] the contractor goes in to make the repairs that are now visual, as proved by test.

Q. In your figure have you made some additional allowance for those unforeseen contingencies? A. Yes.

Q. And including all of that, what is your estimate of the fair and reasonable cost of repairing that boiler and putting it back in operation?

A. $5817.50, and it is my considerate opinion that the government is liable for the total amount of $5817.50.

Q. Now, we have item 11— A. Item 11?

Q. Yes.

A. It is a steam flow meter. Item 11 (a), sub thereon, is, clean and adjust the steam flow meter, in the amount of $32.65.

Q. Is that the fair and reasonable cost of that work?

A. Yes, as a matter of fact, since the time this estimate was made, the steam flow meter has been put into operation.

Q. That particular item has been done?

A. That particular item has been done, put in operation. It is now in operating condition.

Q. But it has been done since this exhibit has been

[fol. 650] compiled, so it still shows on here?

A. That is correct.

Q. You haven't deducted it from your totals at the end of this exhibit? A. No.

Q. Now, item 14. A. Item 14, pipe covering.

Q. Tell us in a little detail what pipes require covering and where?

A. Throughout the building there are conditions where the pipe covering—this pipe covering is insulation on the steam lines throughout the building. This pipe covering has been removed for various causes or conditions. Some of it has deteriorated or been knocked off by normal operations of the particular type of installation. Other portions have been removed to make new connections by the government and there will be some new covering required when the government makes certain restoration connections to the original machinery in relocating certain portions of the work, which it is my opinion that the government is responsible to make.

Q. What is the fair and reasonable cost of doing all of that?

[fol. 651] A. $380.00.

Q. And in that connection and when that work is done, will that pipe covering be back in first-class condition? A. Yes.

Q. And considerable new pipe covering in place of some that was old and deteriorated when the government took over?

A. There is a considerable amount of that type.

Q. Is that true with respect to a lot of these items?

Mr. Hotz: I object to that unless the witness states that he knows what the condition was in 1942 when the government took over.

The Court: I understand the inquiry is directed to when he went in the building.

Mr. Hotz: No, he said in its original state.

The Court: Let see what the record is.

The Court: That will be sustained.

Q. Can you tell us from your knowledge of engineering construction and your examination of this pipe cover-

ing, for instance, whether all of that damage has occurred, or deterioration has occurred since November 22, 1942, or not? A. I can not.

[fol. 652] Q. Let's go to the next item, then, 16. Heat reclaimer. Tell us a little in detail about that, what it is and what is needed. First, the cost you have, and then how you arrived at the charge to the government?

A. Item 16, heat reclaimer. Cost of new heat reclaimer installed $7737.00.

Q. You charge how much of that to the government?

A. Forty per cent charge to the government, based on a life of ten years for this particular type of equipment, $3,094.80.

Q. Your first figure, is that a completely new instrument installed there in the building? A. That is correct.

Q. Does that figure include the installation cost?

A. Yes.

Q. That would be in place of the heat reclaimer that had been originally installed in 1934, or thereabouts, according to their records?

A. That is for a new heat reclaimer of similar type and capacity as is now installed.

Q. Now, the hot water generator, or the hot water tank, as I believe it is referred to. Did you check that with Mr. Osterholm, the witness who testified here?

A. If I understand correctly, you are referring to item 19?

Q. Right.

[fol. 653] A. Item 19 is a heater, hot water heater, which is the same thing as a hot water generator. Item 19 (a) is repair of hot water heater and test, amount $600.00, 100% charge to the government; $600.00 chargeable to the government.

Q. Did you personally examine that hot water heater or tank or generator? A. I did.

Q. And in your opinion is that a fair and reasonable charge?

A. Yes, that is in my opinion a considerate allowance for contingencies.

Q. And if and when that work should be done, would that hot water tank and generator be in good and efficient operating condition? A. Yes.

Q. With all copper therein intact?

A. The copper lining will be sealed throughout. The entire portion of the internal water heater, so that no water passing through this heater will come in contact with the steel outer lining so that there would be no erosion coming from the heater due to any contact with the steel.

Q. Item 20, water softener. What is necessary on that and what is the fair and reasonable cost of doing the [fol. 654] work?

A. I had this item checked by the engineer experienced in this type of work, Refinite Corporation manufacturers of this equipment, who said the equipment is okeh for satisfactory operation. However, I double checked and noticed that certain painting should be done and a few nipples, and perhaps a few clogged spray nozzles, due to the normal operation of this type of equipment, that may need repairs if and when a routine internal inspection might be made at a later date, so I have set up an amount of $183.74, considered allowable at 100%, to make a net amount chargeable to the government of $183.47.

Q. Item 21, steel tank supports. What do those consist of?

A. Steel tank supports under Item 21 (a) 3 new 12"x12"x20'-o" long timbers.

Q. Are they to replace those which have been in there since the original construction?

A. Yes, and to repair certain scuffed corners now noticed to give a first-class job from appearance and structural value.

Q. How much of that do you charge to the government? A. 20%.

Q. Is that based on the normal life of these timbers [fol. 655] and so forth, and time they have been in there? A. Normal life for twenty years.

Q. And state the amount charged to the government on that item? A. $32.06.

Q. Item 22. Did you have that checked?

A. Yes, I had that checked.

Q. Was that electric, general contract? Tell us what is involved in that item?

A. Item 22 (a) relocate electric lights, outlets, remove and install wiring. That includes all wiring devices, feeders, fuses and relocation throughout the entire plant that are required to restore outlets to their original location, and all the original location of the machinery to be relocated. There has been a considerable amount of government owned equipment installed in this installation and entail the installation of larger or a different area of electric services thereto, and in compiling this restoration figure cost for reinstalling the original plan of electric distribution and outlets, having been considered with certain contingencies included therein, a total amount of $774.06.

Q. The next item, repair night bell. I assume that is [fol. 656] just what it says?

A. That includes a new night bell bearing and transformer and some low voltage wiring.

Q. What is the reasonable cost of making that repair? A. $8.75.

Q. Item 25. Did you have that checked by Mr. LaTurner? A. Yes, that was checked by Mr. LaTurner.

Q. That is the machine panel board, an electric panel board, is that right? A. That is correct.

Q. Do you agree with his figure of $500.60, as a fair and reasonable cost of making that repair? A. I do.

Q. Item 28, I believe Mr. Pargett testified on that. That is the repair of the terrazzo flooring and removal of emergency room on the fifth floor. Did you check that with Mr. Pargett and in your own observation? A. Yes.

Q. Do you agree those are the correct fair and reasonable charges on that?

A. Yes, those figures appear ample to cover the work involved.

Q. That is $194.00 for the floor and $45.00 for the removal of the emergency room?

[fol. 657] That is correct.

Q. Going back for just a moment, did you also check and list in this exhibit all of the work that Mr. Rorick testified about? A. Yes.

Q. And all of the items that the other witnesses testified to regarding the resurfacing and waterproofing of the floor where the washing machines would be on the second, third and fourth floors, including the guttering?

A. Yes, these estimates and bids were prepared under my supervision for this particular project.

Q. Have you checked each and every item on Exhibit 17 and the amounts of those items? A. Exhibit 17?

Q. That is the exhibit you have in your hand, "Government's Exhibit 17," I think. A. Yes, I have.

Q. And, in your opinion, are each and all of the items therein listed a fair and reasonable charge for the item opposite which they appear? A. Yes.

Q. In your opinion, Mr. Crowder, after your personal examination and checking of all of these figures, state whether or not in your opinion, if and when the [fol. 658] repairs listed on Exhibit 17 were made to this building, the building would be in first-class condition?

A. Yes, the building, in my opinion, would be in a first class good state of repair.

Q. At the end did you add any further item over and above the specific cost items that we have been talking about?

A. Yes, there is an item of contingencies for estimates.

Q. What does that amount to?

A. That amounts to $660.56.

Q. What is that? Just a general contingency figure?

A. Yes, it is a contingency figure set up to cover any costs of insurance, taxes, social security, and other miscellaneous items, to perform the work by contract, and to allow for any unforeseen conditions which may develop after the work is in progress.

Q. I think there was one item you added that I didn't have on my older list of repair to toilets. Is that right?

A. That is correct. That is the last item. Repair toilet on second floor, amount $25.00.

Q. Including all of the items on the exhibit, and including the contingency item, what in your opinion, is [fol. 659] the total cost, fair and reasonable cost of all of the work thereon listed so as to restore that building to a first-class condition?

A. The total cost of repairs, as compiled on this exhibit under my supervision, is $39,188.81. The portion of that total repair cost considered chargeable to the government is $34,671.34.

Q. I think I have been using the word "building." Should I correctly say building and power plant?

A. That is correct. That is restoration for Kimball Laundry building, building equipment, including power plant and utility equipment in the building.

Q. As distinguished from the general movable machinery and American Laundry machinery and so forth?

A. This exhibit does not include the machinery that is the laundry and dry cleaning machinery, the laundry and dry cleaning equipment, the laundry and dry cleaning fixtures and miscellaneous laundry and dry cleaning items.

Q. Do we have, which we will get to a little later, a separate compilation covering all of those machinery items which, together with this Exhibit 17, will cover everything down there?

A. Everything we have compiled for restoration and [fol. 660] repairs thereto.

Q. The other exhibit, together with the one you have? Do the two of them include everything?

A. Everything for restoration.

Q. I will hand you Government's Exhibit 9 and ask you to state what that is, if you will please.

A. Government's Exhibit 9, consisting of four pages, is a photostatic copy of the second, third, fourth and fifth floors of the Kimball Laundry building, now known

as the Quartermaster Laundry, 15th and Jones Streets, Omaha, Nebraska, being a photostatic copy of the floor plan showing the area of the building partitions, the building equipment, the plumbing, the heating, toilets, rest rooms, women's lockers, showing the location of the laundry machinery, the laundry and dry cleaning equipment, fixtures and miscellaneous items listed.

Q. As of what date?

A. As of 1942, at the time of taking.

Q. Is that from your official files and records?

A. This is from our official inventory, files and records compiled by the Omaha District at the time of taking, or previous thereto.

Q. And does that show where each machine was lo-
[fol. 661] cated at the time the government took possession of this property?

A. With, with a few very minor exceptions.

Q. I will hand you Exhibit 16 and ask you to state what that is?

A. Government's Exhibit 16, consisting of six pages, is a blue print of a plan showing the basement plan of Kimball Laundry, first floor, second floor, third floor, fourth floor, fifth floor. These plans were prepared at various dates ranging from December 20, 1945, December 26, 1945, December 28, 1945, January 4, 1946, January 5, 1946, January 14, 1946, the various and respective dates being the dates upon which each individual sheet was prepared by the United States Army Engineers under my supervision.

Q. I note some red markings on that exhibit. What are those?

A. Those red markings indicate the location of government owned equipment in this installation upon the date or approximately thereof, at the time these respective plans were compiled.

Q. Taking those two exhibits together, 9 and 16, do they disclose the moving about of the original Kimball Laundry equipment?

[fol. 662] A. They disclose—I will answer, yes.

Q. If it requires some explanation, go ahead.

A. They disclose the location of the Kimball Laundry equipment and government equipment at the time Exhibit 16 was prepared and the dates thereof.

Q. Did you have this survey made by Mr. LaTurner and Mr. Newcom of the American Laundry Machinery Company under your supervision? A. I did.

Q. And did their survey and their figures, as finally compiled, cover the cost of moving and restoring to its original position, as disclosed on Exhibit 9, every article of Kimball Laundry machinery in that plant?

A. Yes, with very minor exceptions. That includes the cost of relocating all Kimball owned machinery and equipment and fixtures in its original location, connected and ready for operating, including repairs and labor therefor.

Q. Does that include these items that were stored at Fort Omaha and brought back here in February of this year? A. It does.

Q. Does it include not only moving them back, but connecting them up wherever they have to be connected [fol. 663] and putting them in shape for full operation?

A. Yes.

Q. I will hand you Government's Exhibit 19 and ask you to examine that and state generally what that is?

A. Government's Exhibit 19, twenty-eight pages, is an inventory setting forth, according to our records, a list of office fixtures, office equipment, panel room equipment, shop equipment on the first floor, delivery room equipment, laundry and dry cleaning machinery, laundry and dry cleaning equipment, laundry and dry cleaning miscellaneous items and fixtures, and at the end of each inventory for each floor, there is a photostatic copy of the plans, showing the location of the various items at the time of the inventory.

Q. Now, I will hand you Government's Exhibit 18 and ask you to examine that and state what that is.

A. Government's Exhibit 18, thirty-three pages, is a compilation and recapitulation, including all restoration for Kimball owned laundry and dry cleaning machinery, equipment, fixtures and miscellaneous items, as men-

tioned there, which corresponds very closely to the inventory list as set forth under Government's Exhibit 19; that is, in description.

[fol. 664] Did you also check Respondent's Exhibit 21, in compiling Government's Exhibit 18?

A. Yes, I have checked it generally.

Q. Let me ask you whether there is anything on Government's Exhibit 18 that is taken from, or indicates something on Respondent's Exhibit 21; numbers or something of that sort?

A. The consecutive numbers on the left-hand column are the same.

Q. That is, the consecutive numbers you have set out here on Exhibit 18 are the same numbers and items as the numbers on the left-hand side of the column of the pages of Respondent's Exhibit 21? A. Yes, sir.

Q. Did you compile this Exhibit 18? A. I did.

Q. And does it correctly reflect the items therein set forth and the figures that you computed?

A. It correctly reflects the restoration cost of parts and labor cost of relocation for all items listed therein, including repairs, replacement of parts, labor to install the same, cost of relocation, reconnecting and reinstalling all equipment in its original location, including connections, ready for operation to place in good and efficient operation.

[fol. 665] Q. Let me take these two exhibits for a moment, and will you produce for me—I think you have some other pads of paper similar to Exhibits 10 and 11. Is that all of them?

A. That is the original and copy number two; this is the original, and this is one copy, and this is a third copy.

Q. Mr. Crowder, I will hand you Government's Exhibit 21 and ask you to state just briefly what that is.

A. That consists of work sheets for restoration for various laundry and dry cleaning fixtures and so forth, including considerable miscellaneous items, such as office equipment, special laundry equipment, dry cleaning equipment, gasoline tank, laundry trucks, and various items as listed therein.

Q. Is that similar to the Exhibits 10 and 11 that Mr. LaTurner and Mr. Goodwin testified regarding yesterday and this morning—I mean, in general?

A. Yes, in method of preparation.

Q. Does it cover additional items?

A. And it completes the work sheets for the restoration of the laundry and dry cleaning machinery, laundry and dry cleaning equipment, laundry and dry cleaning fixtures, and miscellaneous items, such as office equip-
[fol. 666] ment, and so forth, as found in the inventory and in the building.

Q. Do Exhibits 10 and 11 and 12, taken together, cover all such items in the building at the time of taking?

A. It covers all such items in the building and the cost of replacing and repairing such items which could not be found in the building which were listed in the inventory in 1942 and the plans as of 1942.

Q. In Exhibits 10 and 11, do they contain some sheets upon which Mr. LaTurner and Mr. Newcom procured part of the facts and figures and on which you procured the balance? A. That is correct.

Q. What is the chief difference between Exhibits 10 and 11 on the one hand, and Exhibit 21 on the other?

A. Exhibits 10 and 11 include in large proportions the machinery and equipment, particularly the machinery and very small items of equipment and miscellaneous fixtures are included therein. Exhibit 21 is purely the balance of the fixtures and equipment to complete the total inventory and restoration.

Q. Tell me whether Exhibits 10, 11 and 21, together, cover all items included in Government Exhibit 19 and Respondent's Exhibit 21?

[fol. 667] A. Yes.

Q. And also Government's Exhibit 18? A. Yes.

Q. Is Government's Exhibit 18 a final compilation of 10, 11 and 21, and also including the items disclosed by these other two lists that I just mentioned?

A. Government's Exhibit 18 is a final compilation of Government's Exhibits 10, 11 and 21 and Government's Exhibit 19.

Q. And Respondent's Exhibit 21, as to list of items and not prices? A. Yes, as to nomenclature.

Q. How were these sheets made up originally in Exhibits 10, 11 and 21?

The Court: You mean the blanks?

Mr. Murphy: Yes.

A. If I understand your question correctly, you are referring to the mimeographed forms, or are you referring to the—

Q. No, the mimeographed forms.

A. The information of costs inserted in there—

Q. First take the mimeographed forms.

A. The mimeographed forms were prepared as a matter of accelerating the work, eliminating considerable [fol. 668] repetition in typing.

Q. The filled in, or typed-in words and figures—let's turn specifically to some item—let's take sheet number 21 of Exhibit 10. You got the figures up there. Under A. you got the description of the article or items to be furnished. A. Description of Item—Extractor, and so forth?

Q. Yes.

A. That was obtained, a general description from the inventory and checked upon the job from the actual machine. Bulletin No. #30 Oct. 1929. The name therefor was inserted by information given myself by American Laundry Machinery, as referring to that particular piece of equipment, and serial procured from the machine in its place in the plant. The year installed was taken from the inventory. The date of survey inserted represents the date on which actual detailed survey was made by Messrs. LaTurner and Newcom. You have a list of parts which was prepared after a detailed and thorough inspection of the machinery by Messrs. LaTurner and Newcom, with unit material costs, total material costs, the labor and hours, cost of labor for hours, total labor, total of all parts and labor required for current repairs [fol. 669] for restoration set forth in (1) and (2) above, one and two being wear and tear and damage due to negligence by government personnel. That total represents current repairs required for restoration on one and two.

Q. Turn to sheet 23. Under A. I note a number of items and figures. Were they obtained and compiled in the same manner as you have just detailed?

A. On that particular sheet, number 23?

Q. Yes.

A. That is seven Fantom Fast marking units. Those were prepared as the result of inspection by Mr. La-Turner and Mr. Newcom and Mr. Pargett and myself and prices compiled by myself.

Q. Generally, Mr. Crowder, how did you get the prices on these items in these three exhibits that were not American Laundry Machinery Company machines?

A. By contacting the reputable manufacturer of the particular type of equipment, or a reputable representative therefor.

Q. Did you do that throughout all these exhibits—I mean the various items in these exhibits? A. I did.

Q. When the American Laundry Machinery men found some item their company did not put out, or they were [fol. 670] not familiar with, did you follow that procedure of checking with the manufacturer of that particular machine, or some representative of that company?

A. I did. Any items of repair listed on the work sheets and which prices I could not get from the American Laundry Machinery, I secured from the manufacturers of that equipment or their representatives, or from estimates compiled by myself based on factual information and definite costs.

Q. Is that a regular engineering method of doing work of that kind? A. That is correct.

Q. Under B. on a number of these sheets, there are certain labor costs of restoring, removing and resetting and connecting certain machines. Do you know from all of these official records what machines were where and what ones had been moved? A. Yes, we have the exhibit.

Q. You needn't check the exhibit.

A. And inventory, which indicate the original location of the machinery, equipment, fixtures and miscellaneous items.

Q. Do you know what items had been stored at Fort Omaha and were returned to the plant in February of this year?

[fol. 671] A. Yes.

Q. And did you get the figures for the hours needed in doing the work of removing and resetting those machines from the American Laundry Machinery men, Mr. LaTurner and Mr. Newcom?

A. I did in a majority of items of machinery.

Q. And in a few items you had to estimate that if there was something they were not familiar with?

A. That is correct.

Q. Where did you get your hourly rates of pay or wages?

A. That was procured from authorized prevailing wage scales of the Omaha territory, Douglas County, Nebraska.

Q. Do you know what hourly wage you used for common labor? A. I used 85c.

Q. Is that the prevailing union rate at or in Omaha?

A. That is higher than the prevailing union rate of common labor in Omaha at the present time. However, it is anticipated that that rate will be approved sometime within the next two or three months, so, in order to cover the cost of this work, we used the advanced rate.

Q. And the other specialists, such as steamfitters and steamfitters' helpers and millwrights, in that manner, did [fol. 672] you use the highest present, or immediately anticipated prevailing wage rates for that type of work in the Omaha territory?

A. Yes, we used the prevailing wage scale rates for that type.

Q. I hand you Respondent's Exhibit 21, and ask you to examine that and note in the third, or last column on the right-hand side, a number of instances where no figure is set down, and I believe Mr. Kinder, the witness for Respondent, who identified this exhibit, testified he could not find these items. Have you checked this Exhibit 21? A. Yes.

Q. Let's start with some of these items that are missing from this exhibit—turn to the first one which I happen to note, which is Item 25 on the second page.

A. Item 25, a gasoline pump and tank. The gasoline pump and tank is now located on the east side of the Kimball building.

Q. It is down there, is it?

A. Yes. It has been damaged but—

Q. Let's turn over to—

Mr. Hotz: I would like to make the objection that counsel should permit the witness to answer. He chopped [fol. 673] him off.

The Court: He is his witness and not yours. You cannot control the manner in which he desires to introduce his evidence. Proceed, Mr. Murphy.

Q. Page 6, I believe, Items 118 to 126 are all missing from this exhibit. What do you say about those items?

A. Item 118 was located in the building, a table 40x12, plank top, in good condition, and cost to relocate in original condition was figured.

Q. Never mind the cost now. We want to find out where these items are. We will come to the cost a little later. 119, 120, 121. Do you know where they are or what happened to them?

A. If I understand correctly, you asked me where they were at a certain date.

Q. Where are they now?

A. They are in the Kimball Laundry building.

Q. Turning over to the next page, Items 156, 157 and 158, of which they have deducted the entire value and give no credit for these items. What became of those items?

A. Items 156, 157 and 158, those items are located in the building.

Q. Who do they belong to?

[fol. 674] A. The Item 158 has been purchased by the Quartermaster laundry as an expendable laundry supply.

Q. Does that apply to some other items throughout this Exhibit 21? A. Yes.

Q. Is it a fact that the government bought and paid for a number of those items which are listed on Exhibit 21 with no credit shown over in the right-hand column?

A. That is correct.

Q. Does Exhibit 21, in like manner, omit any credit to the government for all of these various items that were out in storage at Fort Omaha? A. Yes.

Q. Do you remember how many items were stored out at Fort Omaha? A. They are listed as 107 items.

Q. How many of those are now back at the Kimball Laundry plant?

A. All items that were found in storage at Fort Omaha were brought back to the Kimball Laundry, there being certain items which had been held so that repairs were required, and in that case we figured the cost of the equipment or repairs thereto.

[fol. 675] Q. Were all 107 items returned to the Kimball plant? A. All that could be located.

Q. How many were not located, around two or three?

A. Oh, I would say twelve.

Q. Were they large or small items?

A. Small items, wooden fixtures, tops of tables.

Q. Have all the rest been brought back down there?

A. Yes, except certain items, office items which are in storage.

Q. Well, they are still available?

A. As far as we know.

Q. That is office equipment and not machinery?

A. That is correct, no machinery.

Q. Have you made a rough computation of the value of the items stored out at Fort Omaha brought back and now down in the Kimball Laundry plant and entirely omitted from their Exhibit 21?

A. As I understand you, yes, I have made a rough estimate.

Q. What does that amount to?

A. That amounts to between sixteen and seventeen thousand dollars, based on original cost, and between twelve and thirteen thousand dollars, based on appreciated cost November, 1942, cost to replace, repair and

[fol. 676] relocate, is included in Government's Exhibit 18, and is approximately $4500.00.

Q. Did I understand there are some twelve thousand dollars' worth of machinery and equipment that was stored out at Fort Omaha, charged to the government on their Exhibit 21, for which no credit has been given to the government, although it is removed back to the Kimball Laundry plant now?

A. If I understand the question correctly, you are referring to the value installed, November, 1945, in Exhibit 21?

Q. No, 1942.

A. That, as I stated, the value is between twelve and thirteen thousand dollars.

Q. Have you, in your Exhibit 18, included the cost of repairing or replacing all of those items? A. I have.

Q. And in their Exhibit 21, you mentioned certain items that they have listed and charged to the government, including some baskets and things of that sort that were purchased by the government and paid for in full by the government. Do you know roughly how much that amounts to in dollars and cents?

[fol. 677] A. Roughly that amounts to, purchase cost, 1942, of approximately twelve to fifteen hundred dollars.

Q. And no credit is given the government on their Exhibit 21 for those items? A. No.

Q. To clear up another matter, I will hand you Government's Exhibit 12, and Government's Exhibit 12-A, and ask you if there is any connection between those two? A. Yes.

Q. Were they originally one sheet?

A. That is correct.

Q. And what did the upper half pertain to?

A. The upper half of Government's Exhibit 12 pertains to costs to place laundry and dry cleaning machinery in good and efficient operating condition, relocated in original position occupied at time of taking by government. Listed thereunder is, 1.—

Q. You don't need to read that at the moment. I

mean, generally, does that refer to the work covered by Mr. LaTurner and Mr. Newcom? A. Yes, generally.

Q. And then I think you testified there were other items they didn't cover? A. That is right.

[fol. 678] Q. Does the lower half of that original sheet, or what is now marked Government's Exhibit 12-A, constitute the lower half? A. Yes.

Q. And including those items other than those covered by Mr. LaTurner and Mr. Newcom? A. That is correct.

Q. I will hand you Government's Exhibit 12-B and ask you if that is a carbon copy of the original of 12 and 12-A? A. That is correct.

Q. So that you get the whole picture in one?

A. Correct.

Q. What is the fair and reasonable total cost of restoring, repairing, replacing back to where it was originally of all of the laundry machinery and equipment, miscellaneous machinery and equipment, including that detailed by Mr. LaTurner, and also the additional items that you have testified to today?

Mr. Hotz: Just a minute. I object to that as the witness not having shown himself qualified to answer. Counsel used the term "'originally,'' placing it as it was originally.

[fol. 679] Mr. Murphy: Let me withdraw the question and put it this way, to get it clear:

Q. What, in your opinion, then, is the total fair and reasonable cost of repairing all of the machinery and equipment and relocate it in its original position in the plant, set and connected up, ready for operation, and including both of those items covered by Mr. LaTurner and Mr. Newcom, and the additional items regarding which you have testified today?

Mr. Hotz: I object to that as the witness not having shown himself qualified to answer, his testimony having been in the nature of hearsay, telephone calls and inquiries that he has made, and so, it is in the nature of an appraisal being made by one who is not familiar personally with many of the items that go to make up the

conclusions to which he is seeking to arrive, and that [fol. 680] therefore the witness is incompetent.

The Court: I think the witness has shown himself fully competent. He has testified he has taken special training, he is specially qualified and has been in the business many years, he is acting in an official capacity for the United States Government in the performance of his work and this is a part of it. I don't know how anyone could be better qualified. Overruled.

Q. Answer the total amount. A. $20,471.27.

Q. In that figure you have just given, have you included something in addition to the sum total of the specific items pertaining to all of these various machines and pieces of equipment? A. Yes.

Q. What figure have you added in there and included in the $20,471.27 figure? A. There are two items.

Q. What are those items? A. Item 600—

Q. No, tell us what they consist of. Why aren't they there? What are they?

A. For instance, cleaning and painting machines, fixtures and equipment.

[fol. 681] Q. In addition to the repair list, have you included the cost of refinishing and painting the machinery?

A. We have included the cost of cleaning and repainting machinery and fixtures required according to good and accepted engineering practice.

Q. What does that figure amount to? A. $1,750.40.

Q. What is the other?

A. Contingencies in which are included insurance, social security and so forth, which includes taxes and other contingent items, $2,020.87.

Q. And then, give us again the grand total, including cost of repairing parts, cost of labor, making repairs, cost of replacing the machines in there in original position and connecting them up, and including these special allowances you have detailed? What is the grand total?

A. $20,471.27.

Q. Does that cover all machinery and equipment, as distinguished from building and power plant?

A. Yes, that is laundry machinery and equipment, fixtures and miscellaneous items and dry cleaning.

Q. Did I understand correctly, Mr. Crowder, that if we take finally these two exhibits, Government's Exhibit 17, pertaining to the building and power plant, with a [fol. 682] total restoration cost, as you have previously detailed, of $34,571.34, and Government's Exhibit 18 covering all machinery and equipment and miscellaneous items, with a total restoration cost, including the special allowances you have mentioned, of $20,471.27, and get a total of $55,142.61, that that covers and includes, in your opinion, a complete and total and final fair and reasonable cost and expense of restoring the building and power plant and the machinery and equipment to good and efficient condition and operating condition and including putting all machinery back in its original location, connecting it up, and having it set, ready for operation? A. Yes.

Q. And in compiling these figures and arriving at that final total of some fifty-five thousand dollars, did you have in mind the possibility of who would be doing that work?

A. Yes, I had in mind, when compiling these figures, as a cost for issuing a directive to actually perform this work by subletting same or handling it with various reputable concerns by subcontract or prime contract to perform the work for which this estimate and actual bid covers the cost therefor.

Q. And in your regular procedure, would you then [fol. 683] have to obtain authority from the proper officials to expend this $55,000.00?

Mr. Hotz: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. That is correct.

Q. And having obtained that authority, would you then be required, or be presumed, at least, to accomplish

all of this work for the amount of money you so obtained?

A. Yes, I would be expected to supervise the performance of this work without going back for requests for more funds for the performance thereof.

Q. And did you have in mind in compiling these figures and getting these totals this fact? A. Yes, sir.

Q. And in your opinion, will that total sum of fifty-five thousand dollars do all of those things you have detailed? A. Yes.

Mr. Murphy: The Government now offers in evidence separately and individually, Government's Exhibits 9, 16, 17, 18, 19, 21, and 12-A and 12-B. That, I think, completes our offer and also completes our direct examination of this witness.

The Court: Wait until we see about the exhibits.

[fol. 684] Mr. Hotz: The Respondent, now the plaintiff, makes no objection to Exhibits 9 and 16, they being two plats of the floors of the Kimball Laundry Company.

Government's Exhibit 9, found in Volume IV, at Page 1106.

[fol. 1106] G. Ex. 9 (Received)

Exhibit 9: Four pages of photostats of floor plans showing the location of machinery and equipment on each of the four upper floors of the Kimball Laundry Company at the time of the taking.

Government's Exhibit 16, found in Volume IV, at Page 1115.

[fol. 1115] G. Ex. 16 (Received)

The original architectural drawings dated December 1945 and January 1946 showing the location of various machinery and equipment on the various floors of the Kimball Laundry Company on those dates.

Mr. Hotz: Exhibit 17 is compiled by the witness, or was compiled by the witness, according to his testimony, and it takes in repairs to the building and repairs to the

power equipment, such as heating, plumbing, boilers, stokers, and it takes in resurfacing and waterproofing the floors and rehabilitation of the building, including terra cotta, concrete work, and painting and structural steel work and elevators, and the witness not having shown himself qualified to have made the estimates thereon; and for the further reason that he is testifying in the capacity of an architect or an engineer who bases the conclusions arrived at, according to his statements, from information that he has received in the most part from others and not accompanied by any bids or binding arrangements with any of the contractors with whom he [fol. 685] has talked or obtained his information. That is for Exhibit 17.

The Court: Overruled:

Government's Exhibit 17, found in Volume IV, at Page 1116.

[fol. 1116] Gov't Ex. 17 (Received)

U. S. Engineers Exhibit "D"

Restoration for Kimball Owned Laundry Building, Building Equipment, Including Power Plant and Utility Equipment. Condemnation Case 404. Omaha QM Laundry (Kimball Laundry) 1502 Jones Street, Omaha 2, Nebraska

	Year Installed	Nomenclature	Total Cost of Repairs	Per Cent Repair Cost Chargeable to Government	Restoration to First Class Condition
10.	1924	General Contract	12,650.00	100%	9800.00
1.	1924	General Contract			
		(a) Resurfacing & Repairing approx. 2000 sq. ft. of TMB flooring 2d, 3d, 4th	897.00	100%	987.00
		(b) Sidewalk & concrete floor in Receiving & delivery room (replace & repair)	256.65	100%	256.65
		(c) Window Panes to replace cracked & broken panes	193.78	100%	196.78
		(d) Elevator pit, clean drain & pit & paint channel-support	12.48	100%	12.48
		(e) Roof of penthouse, flashing & collar for 3 steam exhaust lines	30.15	40%	12.06
		(f) Resurfacing and waterproofing approximately 4400 [5600] sq. ft. of mastic flooring between washing machines including gutters under washing machines on 2d, 3d, and 4th floor	9800.00 [$12,650]	100%	9800.00 [$12,650]

Year Installed	Nomenclature		Total Cost of Repairs	Per Cent Repair Cost Chargeable to Government	Restoration to First Class Condition
	(g) Rehabilitation of Building	LS.	8389.00	100%	$8389.00
	1. Replace terra-cotta sills, 2 windows, 1st floor, east side of building.				
	2. Replace terra cotta trim, sills & ornamental work, 1st to 4th floors, east & south sides.				
	3. Replace 6 pcs. Bedford stone panels below 2 windows, 1st floor, east side.				
	4. Replace damaged stops & hinges, repair damaged rails, and rehang doors where required, 12 toilet stalls, 2nd to 4th floors.				
	5. Wire-brush, clean and reputty steel sash, 2nd floor, east side only.				
U. S. Engineers Exhibit "D"—Page 2					
	6. Replace 2 broken corner tile & concrete base, and paint up mortar joints in crack in tile wall & replace 1 corner tile, 5th floor.				
	7. Clean & paint 11 metal rod hoops on wood water tank, tank room, 5th floor.				
	8. Refasten in place dropped accoustical tile panels in 2 private offices, 1st floor.				
	9. Repaper walls only, 2 private offices, 1st floor.				
	10. Clean interior ceilings and overhead surfaces, laun-				

Year Installed	Nomenclature	Total Cost of Repairs	Per Cent Repair Cost Chargeable to Government	Restoration to First Class Condition
	dry work areas, 1st to 5th floors, approximately 6630 sq. yds. before painting. 11. Interior painting throughout, two coats lead & oil, 1st to 5th floors, all surfaces presently painted, approximately 12,200 sq.yds. surface. Includes cleaning woodwork in offices and varnishing, removing paint scale and patch plastering in stair wells, reputtying steel sash where required other than noted above, and repainting storm sash for east windows 2nd floor.			
2. 1924	Structural Steel			
	(a) Repair metal door over chute to basement	9.45	100%	9.45
	(b) Repair and replace fire doors	255.65	50%	127.85
3. 1924	Otis Elevator			
	(a) Repair doors, replacing latches, door guides, chains, sheaves, adjust stop angles	665.00	100%	665.00
U. S. Engineers Exhibit "D"—Page 3				
4. 1924	Sprinkler System	None		
5. 1924	Dumb Waiter	None		
6. 1924	Conveyor Chute			
7. 1924	Heating & Plumbing			
	(a) To remove water & gas pipes service to emergency room & POW lunch room 5th floor	31.00	100%	31.00

Year Installed	Nomenclature	Total Cost of Repairs	Per Cent Repair Cost Chargeable to Government	Restoration to First Class Condition
	(b) Reconnect steam lines to hot water generator as per original hook-up for 135 lbs/sq in	731.40	100%	731.40
	(c) Replace galvanized hot & cold water lines where patched by government	478.69	50%	239.40
	(d) Repair deteriorated pipes, unit heaters & other miscellaneous heating equipment	319.40	40%	127.76
8. 1924	Boiler, Kenny, Water Tube, 225 HP, Stoker fired			
	(a) Repair existing boiler, with new boiler crown sheet, 3 new fire-box plates, and miscellaneous	5817.50	100%	5817.50
9. 1925	Boiler, Kenny, water tube, 300 HP, Stoker fired	None	None	None
10. 1926	Draft Indicator			
11. 1926	Steam Flow Meter			
	(a) Clean and adjust	32.65	100%	32.65
12. 1926	Forced Draft Installation	—	—	—
13. 1924	Ash Hopper	—	—	—
14. 1924	Pipe Covering	380.00	100%	380.00
15. 1926	Stokers	—	—	—
U. S. Engineers Exhibit "D"—Page 4				
16. 1935	Heat Reclaimer			
	(a) Cost of New Heat reclaimer installed	7737.00	40%	3094.80
17. 1924	Cold Water Tank, Steel	—	—	—
18. 1941	Hot water tank, wooden			
	(a) Clean and Paint 11 metal rod hoops on wood water tank—5th floor	Cost included under item 1g		
19. 1935	Hot Water Heater			

	Year Installed	Nomenclature	Total Cost of Repairs	Per Cent Repair Cost Chargeable to Government	Restoration to First Class Condition
		(a) Repair hot water heater and test	600.00	100%	600.00
20.	1930	Water Softeners	183.74	100%	183.74
21.	1924	Steel tank supports			—
		(a) 3 new 12"x12"x20'-0" long timbers	160.30	20%	32.06
22.	1924	Electric, General Contract			
		(a) Relocate electric lights, outlets, remove and install wiring	774.06	100%	774.06
		(b) Repair night bell	8.75	100%	8.75
23.	1924	Exhaust Fans	—	—	—
24.	1941	Boiler Room Fan	—	—	—
25.	1924	Machine Panel Board			
	1935	(a) Repairs & Replacements	500.60	100%	500.60
26.	1940	K.V.A. Capacitor	—	—	—
27.	1926	Compressor, Air Installation (Steam Driven)	—	—	—
U. S. Engineers Exhibit "D"—Page 5					
28.	1935	Addition, 5th floor	194.00	100%	194.00
		(a) Repair and polish approximately 1500 sq. ft. of Terrazzo Floor & repair floor in Emergency Room			
		(b) Removal of Emergency Room	45.00	100%	45.00
29.	1937	Lunch and Feather Room	—	—	—
30.	1940	Garage Electric Doors	—	—	—
31.	1929	Stack Lightning Arrester	—	—	—
		Repair toilet on 2d floor	25.00	100%	25.00
			$38,528.25		$34,116.54
		Contingencies for Estimates	660.56		554.80
		GRAND TOTAL	$39,188.81		$34,671.34
			($2,850.00)		($2,850.00)
			[$42,038.81]		[$37,521.34]

Mr. Hotz: Exhibit 18 is objected to as incompetent, irrelevant and immaterial, prepared by the witness in connection with laundry machinery and equipment with which the witness is not familiar as to values; not familiar with costs, having in each and every instance relied upon information obtained elsewhere and merely a compilation of such hearsay evidence, that being an exhibit consisting of 594 items in which the grand total of restoration is for all the laundry and dry cleaning equipment and is $20,471.27; the witness not having shown himself qualified.

The Court: Overruled.

Government's Exhibit 18, found in Volume IV, at Page 1117.
U. S. Engineers Exhibit "E"—Page 1
[fol. 1117] Gov't Ex. (Received)
U. S. Engineers Exhibit "E"—Page 1
Restoration for Kimball Owned Laundry and Dry Cleaning Machinery, Equipment, Fixtures & Miscellaneous Items — Condemnation Case 404—Omaha QM Laundry (Kimball Laundry) 1502 Jones Street, Omaha 2, Nebraska

No.	App. No.	Description	Quantity	Condition	Cost of Parts	Cost of Labor	Cost of Relocation Including Connections
		First Floor—Supply Room					
1	1	Counter-Zinc-Top-L 21'-6"x4'x32" Ht. 6-Drawers-W 32" Ht. 18"	1	G			
2	2	Shelving above to ceiling-2x2 frame-36" cc 17' Ht. 17" deep-7 tiers shelves	1	G			
3	3	Milbradt Ladder 12'8"x17" with tract, 12'8" above loor	1	G			
4	4	Shelving 2"x2" frame-W. 10' Ht.9'9" 5 shelves 24", 5 drawers below	1	G			
5	5	Open Padding Roll-Cabinet W. 7', Ht. 8', D. 36", Solid back and sides	1	G			
6	6	Shelving 2"x4" frame-W. 9', Ht, 6'6", D. 39" 4 shelves	1	G			
7	7	Shelving 2"x4" frame-W. 6', Ht. 6'6", D. 25" 4 shelves	1	G			
8	8	Cupboard Beaded					

No.	App. No.	Description	Quantity	Condition	Cost of Parts	Cost of Labor	Cost of Relocation Including Connections
		Ceiling W. 5'7", D. 36", Ht.6', Ht. 6'2", 5 shelf-2 door	1	G			
9	9	Counter-Mill Constructed L. 10'6", D. 32", Ht. 30" 4 drawers-shelves above	1	G			
10	10	Flat Top Oak Desk 32"x52"	1	G			
11	11	Table 39"x8'8"-Linoleum top	1	G			
12	12	1940 Addressograph-Model 1700 B 298321-120 Plate drawers					6.70
13	13	Flat top desk 27"x36"	1	F			.50
14	14	1941 Multilith Duplicator	1	G			
15	15	1939 Graphotype & Stand	1	G			1.50
16	16	Balcony and racks	1	G	6.02	6.32	

[fol. 1117] Gov't Ex. 18 (Received)—Continued
U. S. Engineers Exhibit "E"—Page 31

No.	App. No.	Description	Quantity	Condition	Cost of Parts	Cost of Labor	Cost of Relocation Including Connections
572		Sanitary Coil Drinking Fountain	1	G			
573		Reliable Gas Stove	1	G			
574		Coffee Table-30x36	1	G			
575		Hill Shaw Co. Vaculator 4 burner gas plate	1	G			
576		Frigidaire Electric Refrigerator	1	F	LS	45.00	1.70
577		Table - 26"x26"	1	G			
578		Table - 30"x48"	1	G			
		MISCELLANEOUS ITEMS—FIFTH FLOOR					
579		2 Pipe Sack Racks	2	F	LS	1.17 2.90	7.50
580		14 Wood Curtain Racks L. 6', Ht. 5'	14	F	LS	1.65 10.40	
581		6 Pipe Racks - L. 7', Ht. 6'	6	G			
582		1 Pipe Rack - 8', Ht. 6'	1	G			
583		1 Pipe Rack - 12x5	1	G			
584		Electric Wall Clock 12"	1	G			
585		Electric Fan 18"	1	G			
586		2 Electric Fans 12"	2	G			
587		"Health Mor" Vacuum Cleaner	1	G			
588		3 Steel Lockers - 12"x18"x6'	3	G			
589		1 Iron Stool	1	G			
590		2 Steel Bag Trucks	2	G			
591		9 #6 Bag Trucks	9	G			
592		3 #4 Drag Baskets	3	F			
593		1 #6 Drag Baskets	1	F			
594		1 Steel Body Truck	1	G			

600	Cleaning and painting machines, fixtures and equipment	LS	1750.40		
	Contingencies, Insurance Tools, Soc. Security, etc.		2020.37		
				$6,682.39	$8,297.88	$5,491.00

Grand Total for Restoration of All Laundry & Dry Cleaning Machinery, Equipment, Fixtures, and Miscellaneous Items as Listed Herein $20,471.27

Exhibit 18: This exhibit consists of a total of thirty pages all similar in form to the pages here printed, except only that the last page here printed also contains a summary. This exhibit is an itemization by United States Engineer Witnesses of what they considered necessary to restore the laundry machinery, dry cleaning machinery, equipment, fixtures, and miscellaneous items. All these items as shown on the summary on the last page, total $20,471.27 as follows: cost of parts, $6,682.39; cost of labor, $8,297.88; cost of relocation, including connections, $5,491.00.

Mr. Hotz: Now, Exhibit 19, which we have just this moment seen, is objected to, but I would like to first ask the witness a question or two on that.

Mr. Murphy: I think I can save some time on this. May I see that a moment? I think at this time I should withdraw my offer of Exhibit 19. It should have another [fol. 686] identifying witness who will be here, who compiled the original.

The Court: Very well.

Mr. Hotz: Exhibit 19, as I understand it, is withdrawn?

Mr. Murphy: At the moment.

The Court: You will have to continue your objections in the morning. Time for adjournment has arrived.

March 13, 1946. Mr. Murphy: You were in the midst of some objections and rulings on some exhibits when we adjourned last evening.

The Court: You didn't finish your objections to the exhibits that had been offered by the Government.

Mr. Hotz: Objection is made to Exhibits 12-A and 12-B as the conclusion of the witness. The exhibits to which they apparently referred are not identified at all. They were, however, stated by the witness on the stand, but the exhibit itself does not show to which exhibit they refer. They are the conclusions of the witness. They are not the best evidence and the captions are misleading, dangerous and prejudicial in their make-up. They have no place as an exhibit in any event; even though the figures might be in as a summary, certainly the captions [fol. 687] and statements are self-serving and prejudicial.

Mr. Murphy: Before the court rules, I think we should have the record straight. Counsel is looking at Exhibit 12, which is already in evidence, and I think the court does not correctly recall the exhibits. 12-A is the bottom part of the original sheet 12-B, which is the summary of the restoration cost.

The Court: I had in mind they were these bids he submitted in support of his estimate.

Mr. Murphy: No, they are the summary sheets; that is 12 and 12-A, and 12-B is a carbon copy of the entire

sheet before they were separated because of the different items.

The Court: Exhibit 12 was received in evidence heretofore?

Mr. Murphy: That is right, Your Honor. And 12-A and 12-B go to make a complete sheet. They were separate because of different witnesses. 12-B is a carbon copy, but simply the sheet without being torn, to show the whole exhibit.

The Court: Objections to 12-A and 12-B will be overruled and the exhibits will be received.

Government's Exhibit 12-A, found in Volume IV, at Page 1110.

[fol. 1110] Gov't Ex. 12-A (Received)

Costs to place Laundry and Dry Cleaning Equipment, Fixtures and Miscellaneous Items (Which Are Not Included in Costs Set Forth in 1, 2 and 3 Above) in Good and Efficient Operating Condition, relocated in Original Position Occupied at Time of "Taking" by Government Including Cleaning and Painting Costs for Machinery, Equipment and Fixtures

4.	Total Costs of Parts and Materials Delivered at Building, Omaha, Nebraska	$ 1,660.52
5.	Total Cost of Labor to Install and Repair Parts	4,380.37
6.	Total Costs to Relocate in Original Position, Connected, Ready for Operation	2,761.65
	Total of 4, 5 and 6 above	$ 8,802.54
	Grand Total of 1, 2, 3, 4, 5 and 6	$20,471.27

[fol. 688] Government's Exhibit 12-B, found in Volume IV, at Page 1111.

Mr. Hotz: Exhibit 21 is sheets numbered 270 to 343, inclusive, of what apparently is a description of certain items that were not on Exhibits 10 and 11.

The Court: Those are the work sheets?

Mr. Hotz: They are some of the work sheets of the same make-up as Exhibits 10 and 11.

The Court: They represent items that were not included therein that have been made up from his own in-

vestigation and his own judgment, is that right?

Mr. Hotz: That is right. We object to the exhibit as not the best evidence, the witness not having shown himself qualified to answer, and he testified as to many items of laundry supplies and equipment of that type, all of them signed by C. R. Crowder, with various estimates that have been obtained from others, as shown by the exhibit, and it is not the best evidence and prejudicial.

The Court: The court has heretofore expressed his opinion of the qualifications of the witness. In addition, my recollection of his testimony is that these are official reports and may be treated and hereafter used as offi-
[fol. 689] cial reports and are made up for that purpose, and as such might be in the nature of official documents. Overruled.

Government's Exhibit 21, found in Volume IV, at Page 1119.

Government's Exhibit 21, found in Volume IV, at Page 1119.

[fol. 1119] Gov't Ex. 21 (Received)

Sheet No. 270 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)
Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:
(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 12 Present Location Gordon Van & Storage
Description of Item Addressograph Original Location 1st Floor
Bulletin No.
Serial No. B 298321 Model or Style 1700
Year Installed Age of Equipment (Years)
Date of This Survey 8 Febr 46 Estimated By C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials

B. Cost to Relocate in Original Position, as per (3) Above.

TOTAL RESTORATION COST—"A" plus "B" 6.70

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Drayage			1	2.50	2.50	2.50
Put in operating Condition						
Clean externally			4	1.05	4.20	4.20

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

[fol. 1119] Gov't Ex. 21 (Received)—Continued

Sheet No. 275 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. Present Location Mezzanine Original Location 1st Floor

Description of Item Call Shelves

Bulletin No.

Serial No. Model or Style

Year Installed 1925 Age of Equipment (Years)

Date of This Survey 16 Febr 1946 Surveyed By C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Cost Labor & Materials
Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Cost Labor & Materials
Move from Mezzanine to 1st Floor	Laborer		8	0.85	6.80	6.80
Clean and adjust	Laborer		2	0.85	1.70	1.70
TOTAL RESTORATION COST—"A" plus "B"						8.50

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

[fol. 1119] Gov't Ex. 21 (Received)—Continued.

Sheet No. 289 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 2J Present Location Ft. Omaha

Original Location 2nd Flor

Description of Item Wheeler and Wilson H. H. Sewing Machine

Bulletin No.

Serial No. None Model or Style W-9

Year Installed Age of Equipment (Years)

Date of This Survey 1 Febr 1946 Surveyed By C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
Repair and Recondition Estimates made by Mr. Grimes and Mr. McMahn of Singer Sewing Machine Co.						21.00

B. Cost to Relocate in Original Position, as per (3) Above.

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
O.K.						

TOTAL RESTORATION COST—"A" plus "B" $21.00

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

Returned to 5th Floor of QM Laundry on 14 Febr 1946

Repair Parts Costs from No.

[fol. 1119] Gov't Ex. 21 (Received)—Continued

Sheet No. 307 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. Misc. Present Location Ft. Omaha*

Original Location 3rd Floor

Description of Item Wallace Tiernan bleacher unit

Bulletin No.

Serial No. 152 Model or Style Manual

Year Installed Age of Equipment (Years)

Date of This Survey Febr. 16, 1946 Surveyed By C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man-Hours	Labor Rate/Hour	Total Labor Cost	Total Costs Labor & Materials
New valve & pipe assembly	L.S.	76.00				
1 set of gages	L.S.	18.50				
		94.50				94.50
Repair stand and reassemble hook-up	Pipefitter		18	1.58	28.44	
	" Helper		18	1.07	19.26	
					47.70	47.70
						142.20

B. Cost to Relocate in Original Position, as per (3) Above.

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/Hour	Total Labor Cost	Total Costs Labor & Materials
Relocate in original position	Pipefitter		4	1.58	6.32	
	" Helper		4	1.07	4.28	10.60
					10.60	

TOTAL RESTORATION COST—"A" plus "B" 152.80

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

*Returned to 1st floor, Kimball Laundry, Febr. 15, 1946

Repair Parts Costs from No.

[fol. 1119] Gov't Ex. 21 (Received)—Continued

Sheet No. 325 Restoration Survey Worksheet A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. Misc. Present Location Original Location 4th Floor

Description of Item 8 Clocks on dryer and tumblers

Bulletin No. (Measuring timers)

Serial No. Model or Style

Year Installed Age of Equipment (Years)

Date of This Survey 19 Feb 46 Surveyed By C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials
8-Measuring timers (clocks)	9.50*	76.00				76.00

B. Cost to Relocate in Original Position, as per (3) Above.

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Costs Labor & Materials

TOTAL RESTORATION COST—"A" plus "B" 76.00

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

*Price quoted by Carman Distributing Co., 1201 Cass Street, Omaha, Nebr.

Repair Parts Costs from No.

[fol. 1119] Gov't Ex. 21 (Received)—Continued

Sheet No. 343 Restoration Survey Worksheet for A-34

OMAHA QM LAUNDRY (KIMBALL LAUNDRY COMPANY)

Located at 1502 Jones Street, Omaha 2, Nebr.

Restoration will include the following:

(1) Wear and tear (2) Damage due to negligence by Government personnel (3) Restoration or reinstallations necessitated by alterations or removals by the Government.

Item No. 600 Present Location Original Location

Description of Item Cleaning & painting equipment and machines

Bulletin No.

Serial No. Model or Style

Year Installed Age of Equipment (Years)

Date of This Survey Febr. 25, 1946 Surveyed By A. J. Pargett
C. R. Crowder

A. Current Repairs Required for Restoration Set Forth Under (1) and (2) Above

Description of Parts or Work Required for Normal Operation	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Cost Labor & Materials
Cleaning approximately 258 items, allowing 1 hour per machine for millwright & helper						
	Millright		258	1.45		374.10
	Helper		258	.85		219.30
Chemical cleaner	1.75/gal	56.00				56.00
Brushes, rags, etc.	L.S.	12.00				12.00
	Painter		764	1.25		955.00
Paint (water spar Enamel	4.17/gal	108.42				
Brushes	4.26	25.58				25.58
						1,750.40

B. Cost to Relocate in Original Position, as per (3) Above.

Description and/or Directions	Unit Materials Cost	Total Materials Cost	Labor Man Hours	Labor Rate/ Hour	Total Labor Cost	Total Cost Labor & Materials

B. Cost to Relocate in Original Position, as per (3) Above.

Remarks: All above prices are F. O. B. 1502 Jones Street, Omaha, Nebraska

Repair Parts Costs from No.

Exhibit 21: This exhibit consists of a total of 75 sheets all similar in form to those here printed and containing itemized statements compiled by the witnesses thereon, either C. R. Crowder alone or C. R. Crowder and A. J. Pargett of the United States Engineers showing details of material and labor, including man hours, rate per hour and total cost of labor and material, as estimated by these witnesses, covering the cost of restoring and replacing the items described in the exhibit.

Cross-Examination of C. R. Crowder by Mr. Hotz:

Q. How old are you?

A. I will be 41 in July, 1946.

Q. Do you have a superior of that office, a superior man in charge of the office of Army Engineers?

A. Yes, everyone who works for the government has a superior.

Q. I didn't ask that. Strike that out, the last, as not responsive.

The Court: Are you moving or directing, or are you asking to have it stricken?

Mr. Hotz: I move to have it stricken.

The Court: The motion will be sustained, but I maintain the right to make the directives.

Q. Who is the man who is your superior?

A. You mean direct superior?

Q. Yes. A. Ralph N. Platts.

Q. What is his title?

A. He is also an engineer, a mechanical and electrical engineer.

[fol. 690] Q. Out of this office here?

A. He is located in this office.

Q. Is there an officer above him. A. Yes, sir.

Q. Who is that? A. Major Henry R. Brown.

Q. And he is from this office here in Omaha?

A. Yes, sir.

Q. And above him, who is there?

A. Colonel Stanley R. Reiff.

Q. Does Colonel Goodall have anything to do with your office, or don't you know?

A. Yes, I know Colonel Goodall is in charge of the real estate division and Missouri River division for us and this section.

Q. Is he the head of all?

A. No, sir, he is the head of the real estate division of the division engineer's office.

Q. How many of you men are in the office here in Omaha?

A. I don't have the exact personnel. I would hes-

itate to disclose that information, which might be confidential, but I will give approximate figures if the court so wishes.

The Court: I see no particular purpose in that. I take it there is no doubt about your official appointment [fol. 691] and your capacity and your authority in the department, is there? A. No, sir.

The Court: I take it to be so.

Q. Where are you located? Where are your offices located?

A. In the Farm Credit Building, Omaha, Nebraska.

Q. And they have never been located down in the Kimball Laundry Company?

A. No, sir. The division engineer's office, being a supervisory office for the Omaha District office, Denver District office, Fort Pitt District office, Kansas City District office, which supervises the different post engineers and subofficers, area engineer officers and resident engineer officers. We review the work and approve the work of all those subordinate offices and in coordination with our function of the Seventh Service Command.

Q. You mentioned that you were a graduate of a school and I didn't just quite get that.

A. If I understand you correctly, you did not get the name of the college?

Q. Yes?

A. The name of the college is Georgia School of Technology.

[fol. 692] Q. And you graduated from there in 1926?

A. That is correct.

Q. What was your degree?

A. Degree of Bachelor of Science and Electrical Engineering.

Q. You got out of there in 1926, did you?

A. That is correct.

Q. What did you do after you got out of school?

A. If I understand you correctly, you wish that I relate the sequence of my work for the past twenty years?

Q. Yes?

A. Briefly, I have been employed at various engineering jobs, electrical and mechanical equipment controls, manufacturing, designing, inspection, estimating of various types of mechanical and electrical equipment.

Q. For whom have you been employed, some of the people?

A. I have been employed by the Southern Bell Telephone Company, by the American Radiator and Standard Sanitary Corporation. I have operated my own business, consulting engineer, Crowder Engineering Company.

Q. Where located?

[fol. 693] A. Birmingham, Alabama. I worked for the Wholesale Mill supply houses.

Q. Did any of them that you worked with, up until the time you came with the government, construct, buy or sell laundry machinery and equipment? A. No.

Q. In your experience up until the time you came in the army; that is, with the army engineers, did you have occasion to construct a laundry?

A. If I understand correctly, you are asking, did I actually have a contract for the construction of a laundry building in its entirety before going into the employ of the United States Government?

Q. Yes?

A. The answer is no.

Q. Did you have occasion to construct any part of one before you went into the engineer's office?

A. Yes.

Q. What part and where?

A. Various dry cleaning establishments, power plant equipment for the same throughout Alabama, Mississippi, and Louisiana.

Q. That would be in connection with electrical engineering work, in connection with those plants?

A. In connection with the electrical and mechanical [fol. 694] power plant equipment.

Q. What do you mean by mechanical power plant equipment?

A. Such as the hot water heating equipment and boilers and controls and so forth.

Q. Did you have any occasion to deal in, or consult in reference to laundry machinery and equipment necessary in the operation of a laundry, excepting that which you have testified to, before you came here?

A. During the period which you spoke of?

Q. Yes? A. Recently?

Q. No, in the period before you came here.

A. Before I came in this courtroom?

Q. Before you came to the city of Omaha to be identified with the engineers?

A. If I understand your question correctly, and making further reference to former testimony, may I explain I have been an employee of the United States Engineers for four years, and during the previous two years I did have experience in the design and writing of specifications for the mechanical and electrical equipment for laundry and dry cleaning installations, installed as new installations, or additions thereto.

Q. Where was that?

[fol. 695] A. One was at Fort Riley, Kansas, and the other Camp Carson.

Q. Was Camp Carson after you came in the army?

A. Yes.

Q. Was Fort Riley after you came in the army?

A. Yes.

Q. I think you misunderstood. I said, before you came in the army, in reference to installations of laundries.

A. If I understand correctly, you mean before I was employed by the United States Engineers?

Q. Yes? A. The answer would be no.

Q. What was your work at Camp Carson, Colorado? What did it entail?

A. It entailed the design of the power plant equipment, the lay-out of the building showing location of the dry cleaning equipment and fixtures, controls and all special equipment appurtenant thereto.

Q. How long were you there at Camp Carson?

A. I was not located at Camp Carson.

Q. Where were you located?

A. District Engineers office at Denver, Colorado, that office being charged with responsibility for the proper [fol. 696] preparation and design and plans and specifications, letting the contract and handling the inspection of the correct installation of that particular type of installation.

Q. Did you go down there and make the inspections yourself? A. Yes, some of them.

Q. Which ones?

A. We had inspectors on the job. Our work was supervisory after the plans and specifications were issued and bids were taken.

Q. What other laundries did you have anything to do with? You said Fort Riley. That was after you became identified with the project at Camp Carson and after you were identified with the army engineers, is that right? A. That is right.

Q. To what extent were you identified with that project at Fort Riley?

A. To the extent that the whole laundry was rebuilt under the supervision of this office, a suboffice of the Kansas District.

Q. You were in Kansas City at the time?

A. No, sir, I reviewed the plans and specifications and mechanical and electrical features for their cor- [fol. 697] rectness.

Q. Where were you located?

A. I was located in Omaha, Nebraska.

Q. At that time? A. That is correct.

Q. In these various experiences you have had, both at Fort Riley and Carson, when the work was done, or about to be done, there were specifications that were drawn by you or the office and submitted to the various supply houses, contractors and others, that had to do with the actual construction and building, isn't that right?

A. That is partially correct. The laundry equipment being furnished by the United States Quartermaster Corps Office of Procurement in the large majority of the cases.

Q. What do you mean by that? I just don't understand. Will you explain it further?

A. Explaining it further, I mean that the plans were prepared under the supervision of this office by the Kansas City District, showing the layout production layout of the various items, washers, extractors, drying tumblers, ironers, and sewing and utilities, electrical connections and other building and power plant equip-
[fol. 698] ment required for the proper operation and function of the same.

Q. Where did the machinery and dry cleaning equipment come from?

A. It came from various manufacturers of that particular type of equipment.

Q. Directly under your purchase or through the Quartermaster Corps?

A. Through the Quartermaster Corps, Office of Procurement.

Q. In other words, the Quartermaster Corps took up the matter of the procuring of that equipment, style and kind, and it was not under the engineer's direction except to the extent of coming through the Quartermaster Corps?

A. There was a coordination between the Quartermaster Corps and the Engineering Corps in the proper preparation and coordination in the arrangement of the laundry and dry cleaning equipment, the engineers having to know the equipment that was involved to provide the necessary operation and operational facilities therefor and assisted in the proper arrangements.

Q. So, whatever specifications were required as to machinery was by the Quartermaster Corps. They had whatever specifications were required to be signed by
[fol. 699] the manufacturer, is that right?

A. Yes, the specifications were generally, not in all

cases, based on standard specifications which were available on the laundry and dry cleaning equipment.

Q. Those were all made up and handled by the Quartermaster Corps?

A. That is correct, because that was a direct function of the Quartermaster Corps.

Q. That is the building, the floors, and the boilers, and the installations of that type, is it true, wasn't that under your supervision of the engineers?

A. The entire job came under the supervision of the Engineering Corps for complete installation.

Q. But you have just explained that so far as the machinery and equipment was concerned, that was through the Quartermaster Corps, such as the building? A. No.

Q. Did the boilers come through the Quartermaster?

A. No.

Q. Did the purchase of land come through the Quartermaster? A. No.

Q. Did the style and kind of building come from the [fol. 700] Quartermaster Corps? A. No.

Q. When you went into all those matters you had standard specifications in each and every instance? That was required by the government?

A. Not in every instance. There is a lot of special equipment in each type of installation, according to government practice.

Q. Even with equipment you have specifications that are required?

A. That is correct, but those specifications are prepared, in a great many instances, by the Engineering Corps.

Q. But, nevertheless, specifications, isn't that right?

A. Specifications were prepared, as that is a standard engineering procedure.

Q. In connection with the Kimball Laundry Company, I will ask you if you were not acquainted with the fact that the American Laundry Machinery Company were making an investigation to determine the repairs neces-

sary to the machinery and equipment there in December of 1945?

Mr. Murphy: Objected to as incompetent and immaterial and not proper cross-examination.

[fol. 701] The Court: Overruled. A. December, 1945.

Q. More properly, November, 1945?

A. If I understand you correctly, you wish to direct your questions to November?

Q. Yes?

A. I was familiar with the fact that the American Laundry Machinery Company salesmen were in and out of the quartermaster laundry building, yes.

Q. Calling your attention to Kimball Laundry Exhibit 21, I will ask you to state when you first saw a copy of that exhibit?

A. If I understand the question correctly, you are asking when I first saw a copy of this exhibit in its entirety as it is now compiled?

Q. You are pretty technical. Let's get the contents of that exhibit.

The Court: Let us be fair to the witness. Tell us when you saw any part of this exhibit, if you can.

A. Answering the question in that manner, I saw the nomenclature, which is description, of all items listed herein with a very few minor exceptions, on about December 15th. The values, cost installed, value installed November 21, 1942, and value installed November, 1945, [fol. 702] were not included in the sequence and listings which I saw in December, 1945.

Q. When did you first see the tabulations of the figures on the right-hand side?

A. After they were entered in this court.

Q. After they were entered in this court?

A. Correct.

Q. You say that you knew there was a salesman in and out of the Kimball Laundry Company?

A. Yes, I knew that after the fact. The salesman, I understand, was in there during November, or sometime

thereabouts and I knew between about December 15th and January 1st.

Q. Did you know that Mr. Peter Dahlquist, an engineer for the American Laundry Machinery Company was down at the plant of the Kimball Laundry Company in the latter part of November checking over all the machinery and equipment on the list which you stated you had seen, consisting of 594 items?

A. I didn't know the party by that name. I knew there was a representative of the American Laundry Machinery Company in the building, after the fact, by word of mouth.

Q. Did you know there were two men from the American Machinery and Supply Company there?

[fol. 703] A. Only by word of mouth.

Q. Did you call up the American Laundry Machinery Company in Chicago, call up the headquarters, to send two men out? A. No, sir.

Q. Did your office?

A. It was done under my supervision.

Q. Who did that?

A. Either Mr. Currey or Colonel Goodall.

Q. Isn't it true that Mr. Ray Bicknell of the American Laundry Machinery and Supply Company in Chicago was contacted over the telephone in reference to sending men here for the purpose that you wished to have them used for in connection with the repairs and maintenance on these machines?

Mr. Murphy: Objected to as incompetent and immaterial, and to save time, we grant, of course, that the two men from the American Laundry Machinery Company who were here and testified as witnesses, were brought here, or sent here at our request, for the very purpose for which they did the work.

The Court: That settles it. Move on to something else.

Q. You knew that, did you not?

A. I knew Mr. Bicknell had been contacted, yes, [fol. 704] but I didn't contact him.

Q. Who did?

A. Mr. Currey and Colonel Goodall, I understand.

Q. You knew, did you not, that Mr. Kinder, who was on the witness stand and testified, and Mr. Goodwin, who was on the witness stand and testified, and Mr. La-Turner, who was on the witness stand and testified, and Mr. Newcom, who was on the witness stand and testified, were all from the American Laundry Machinery Company, did you not?

Mr. Murphy: Objected to as incompetent and immaterial, there being no question of that fact.

The Court: I don't see any purpose in all that. They so testified. We know that from their testimony here in the courtroom.

Mr. Hotz: I want to know if the witness knows it.

The Court: He was here and I assume he heard it as well as the rest of us. Let's move on. We are spending a lot of time this morning.

Q. When did you make up and complete Exhibit 21, your own Exhibit 21?

A. Exhibit 21 has been in the process of compilation for the past two and one-half months.

Q. Please tell me when you completed it?

A. Two days ago.

[fol. 705] Q. When did you complete Exhibits 10 and 11? A. Approximately three days ago.

Q. When you made up Exhibit 18, Government's Exhibit 18, you had at that time before you Exhibit 21 of the Kimball Laundry Company?

A. That is correct. I had the data therein. So far as the figures were concerned, they were compiled formerly to the time I saw Exhibit 21. The restoration costs in Exhibit 18 had been compiled prior to the time I had access to Exhibit 21.

Q. Did you have any written specifications for any of the work? You have made estimates on these Exhibits 21, 10 and 11, which are also summarized in your Exhibits 17 and 18. Do you have any written specifications with written bids, and if so, which ones?

Mr. Murphy: Objected to as irrelevant and immaterial, the Exhibits 10, 11 and 21, themselves, constituting exactly what counsel is asking about, written specifications detailing the work and the bid.

The Court: You mean independent contracts from someone who was offering to do the work at that price?

Mr. Hotz: Yes.

The Court: Have you secured bids to support your judgment or opinion in respect to these items you have [fol. 706] testified to? A. Some items, yes.

Q. What items?

A. Which exhibit are you referring to, please?

Q. To your own 18 and 17. Will that be enough for your purpose?

A. Taking first Government's Exhibit 17, Item 1. General Contract. Those items have been previously testified to by—

Q. That was Rorick?

A. Mr. Alexander and Mr. Pargett. Item 2, having been testified to by myself and Mr. Pargett.

Q. That is the paint job by Schaap?

A. I beg your pardon.

Q. Who is the man?

A. Item 1 includes the paint job by Rorick.

Q. What is 2?

A. Item 2, Structural Steel. That includes repairing metal door over chute to basement, an item to which I testified; repair and replace fire doors, an item for which Mr. Pargett testified. Item 3—

Who was it who was the contractor, Mr. Rorick?

The Court: He has just testified to it.

Mr. Hotz: I didn't hear him.

The Court: Better read the answer. Pass on to [fol. 707] Item 3.

Mr. Hotz: Your Honor, I didn't get the contractor.

The Court: He didn't say there was a contractor.

Q. Then, as I understand it, you did not have any written bids? A. No.

Q. What I am asking you for in those exhibits—let's get it straight—I don't care for you to tell me the items you do not have bids for. I would like to have you tell me the items on Exhibits 17 and 18 for which you do have written bids and who the contractor is from whom you have the written bids?

A. Item 3, Otis Elevator. Repair doors, replacing latches, door guides—

Q. You don't need to read it.

A. An item from which we have a bid from the Otis Elevator Company, Mr. E. J. Welch. Next item upon which we have a bid is the Item 8 on that exhibit. Repair existing boiler. We have a bid for the work from the manufacturer of this boiler, an Omaha firm.

Q. Named what?

A. Drake, Mount & Williams. Those are the three names.

Q. Drake, Williams and Mount.

[fol. 708] A. Drake, Williams and Mount, I believe that is correct. Item 16, cost of new heat reclaimer installed. We have a price on the heat reclaimer from the Patterson-Kelley, Incorporated, Chicago, and a cost for the installation of this item and removal of the present item of this type of equipment by the Natkin Company, local Omaha pipe contractors. Item 19, Hot water heater, repair hot water heater and test. We have a bid from the Economy Welding Company. Mr. Osterholm testified regarding that item. Item 25, maching panel board, repairs and replacements. We have prices from the American Laundry Machinery.

Q. Please, I don't care for prices. I am asking for bids.

A. That constitutes a bid from that concern on that type of work.

Q. Is it in writing or isn't it?

A. Is it in writing?

Q. Yes, is it in writing, or not.

A. It is made up by Mr. LaTurner in price.

Q. Have you a written bid on it?

A. As much of a written bid as the government has ever had on that type of work. May I explain that we have done restoration work on laundry machines just [fol. 709] recently in the past six months involving this exact type of work, with very minor exceptions, and these prices are one and the same, and the same method of procuring this cost was used for procuring costs on other restorations of laundries, and which costs have been substantiated by the actual performance and completion of that particular type of work.

Q. Is it written or is it oral? A. It is a work sheet.

Q. Is is written by the contractor that you have been talking about, or isn't it? Is there a written bid on it?

A. There is a work sheet.

Q. I am not talking about your work sheets. They are not what I am talking about.

The Court: What you are inquiring about is, did he ask them to submit a written proposal to furnish or perform the work, or furnish the material? That is what you are asking for, is it?

Mr. Hotz: That is it exactly.

The Court: If you don't have that in that form, say so and we will go on to something else.

A. I asked the representative of the American Laundry Machinery, to give prices and using the existing [fol. 710] labor cost established—

The Court: Suppose the court asks a question for his information: In handling business of this kind, is it the practice of the government engineers to require such formal bids, or do you accept the prices submitted as an offer to supply the merchandise at that price? Tell us about that.

A. We accept prices submitted in this nature as an offer to perform this type of work.

The Court: That is your general practice in your governmental work?

A. Yes, on this type of restoration.

The Court: How long has that practice prevailed?

A. That is a question hard to answer as to the exact length of time.

The Court: Oh, well, just about? Has that been your practice since you have been here in Omaha? A. Yes, sir.

The Court: During the war?

A. On this type of work, that is correct.

The Court: Does that clear it up for you?

Mr. Hotz: One more question.

Q. When you say "this type of work," what are you referring to?

A. I am referring to restoration of laundry equip- [fol. 711] ment and machinery.

Q. You say you do not have any written bids that the government submits to concerns like the American Laundry Machinery Company for that purpose ahead of time to be signed up?

A. Yes, we have prices from the American Laundry Machinery Company.

Q. I am talking about bids. You stated to the question that was asked that it was your custom, that they didn't have any bids, that you accepted an oral statement. I want to know if you will go ahead on an oral statement or must you have a written bid signed to, binding the party?

A. We go ahead on an oral statement in a project of this type.

Q. To what extent?

A. That the prices have been received from a reputable manufacturer and the cost for installing the special type of parts so stated by the manufacturer thereof on this particular item.

Q. Does that contemplate that the engineers go in and do the work? A. No.

Q. Just a minute—let me finish—or does that contemplate the American Laundry Machinery go in and [fol. 712] do the work?

A. That contemplates the American Laundry Machinery will furnish the parts and send their special technical representative to restore it.

Q. Does your answer contemplate, when you stated that oral bids were customary and usual in this type of installation, that that be done by the engineers, or does it contemplate that it be done by a contracting party?

A. It contemplates it could be done by either method.

Q. It could be done by either method? A. Yes, sir.

Q. Will you please explain what you mean by that?

A. I mean that the government could request these repairs to be made by the American Laundry Machinery or a commercial laundry could request that they be made by the American Laundry Company.

Q. What did you do in the instant case we are talking about? Did you have bids from the American Laundry Machinery Company to make these repairs on that machinery and equipment, or didn't you in writing?

A. To which installation are you referring?

Q. The one that is covered largely by Government's Exhibits 10 and 11?

Mr. Murphy: Object to that last question as irrelevant [fol. 713] and immaterial, those particular exhibits constituting in themselves written statements in detail and signed by the representatives of the American Laundry Machinery Company, sheet by sheet, being the best evidence.

The Court: He can state what you have stated. If they are signed and approved and certified by a legitimate representative of the machine company, why doesn't he say so and call our attention to it?

A. We have a work sheet signed by the representatives of the American Laundry Machinery Company.

Q. Was that signed for the purpose of binding the American Laundry Machinery Company, or was it a verification of figures?

A. Signed for the purpose of getting actual costs in performing the work and a basis upon which the funds could be procured for the actual performance of this work, either by contract by the government, or by a commercial laundry, setting up the proper amount of funds to do the work properly.

Q. What else is there where they have a written contract to do the work?

A. Item 28 was testified to by Mr. Pargett, and also, I believe that constitutes the bids on that particular exhibit.

[fol. 714] Q. Who was that one? I didn't get the name of the contractor? A. That was Mr. Marchietti.

Q. That is in regard to the terrazzo floors? A. Yes.

Q. You did have a bid from him?

A. He agreed to do the work for that amount of money.

Q. In writing?

A. He signed his name to the work sheet, which is sufficient for the government to go ahead and issue instructions that a formal contract be issued if and when the project is approved for funds.

Q. He signed his name to one of the work sheets in any of these exhibits?

A. No, he didn't. We have a pencil copy of his signature.

Q. Do you know how many square feet of cement floor finish there is in the building of the Kimball Laundry Company? A. Do I know?

Q. Yes?

A. We have plans indicating such, yes. I could not state the exact amount without actual scale. I have had no reason to actually sum the total. We have exhibits that show the amount without a doubt, in my considerate [fol. 715] opinion.

Q. Do you know how many square feet of mastic floors there is in the building?

A. If I understand the question correctly, you are referring to the mastic floor under the washer aisles, or the other mastic flooring?

Q. I am referring to all the mastic flooring in the building, the number of square feet of mastic floors in that building from the bottom to the top?

A. That would be the difference between 4400 square feet included in the washer aisles on the second, third

and fourth floors, with perhaps a very small amount on the office space of the—no, on the first floor that is terrazzo. To my knowledge, the amount of square feet of mastic would be the difference between 4400 square feet in the washer aisles on the second and fourth floors, as showing the actual size of the floor area, excepting also the toilet rooms—

Q. But you don't know of your own knowledge the amount of square feet of mastic flooring, do you?

A. I know what is involved, yes. It is a question of putting a rule on there and running it off and multiplying and adding it up.

Q. Does your plan show what are mastic floors and [fol. 716] what are concrete floors?

A. I am not sure it so marks it, but I know.

Q. All right, tell us, if you know?

A. I know the area. If you hand me the exhibit I can measure it and if granted time I can compile it in a short while.

Mr. Murphy: I ask that counsel be fair with the witness and hand him the plans.

The Court: If the plan shows the areas, counsel can figure it up as well as the witness on the stand. Let us not take time for that. It is already in evidence. Here are these plats of the floor area. If there is any explanation you want of the plats, ask the witness. Let him point out the area where it is and the measurements.

Q. Do the plats, Number 16, for example, show how much is mastic flooring, or not?

A. No, that is indicated on the photostat of the original plat made up by the army district of the United States Engineers that you have in your hand in the year of October, 1942.

Q. I will hand you this other exhibit, Number 9. Does that show the mastic floors?

A. It shows the area, yes. It is not marked mastic floor on the plat.

[fol. 717] Q. I will ask you if those were not put in in red pencil here in the courtroom?

A. The mastic flooring for the washer house was put in here in the courtroom for the purpose of describing the mastic flooring and waterproofing to be placed, or which was estimated to be placed in the washer house on the second and fourth floors. There is a special mastic throughout the majority of the remaining area on those floors, and which is an olive T.M.B. flooring, a special type of mastic different from that mastic which was figured to be put in the washer house and gutter space.

The Court: From these maps, how can you figure up the area at all? That is what he is trying to get at.

A. Roughly taking the difference in the total area of the floors.

The Court: What is that? Is that shown in figures anywhere, or would it have to be computed?

A. It would have to be computed and testified to at a later time, to be accurate.

The Court: If that is important, Mr. Hotz, we will have that figured up later.

Q. Please turn to Exhibit 17. That is Government's Exhibit 17. In that exhibit, you have tabulated on the [fol. 718] last page a sum total of $34,671.34, to put the building, structural steel, elevators, sprinkler system, dumb waiter, conveyor chutes, all heating and plumbing, the boilers, draft indicator, steam flow meter, forced draft installation, ash hopper, pipe covering, stokers, heat reclaimer, cold water tanks, hot water tanks, water softener, steel tanks, exhaust fans, machine panel boards, compressed air installations, lunch and feather room, and repair to the terrazzo floor on the fifth floor, all for $34,671.34, is that right, subject, of course, to alteration you made there that it was $39,188.81, but the part you think the government should stand of that is $34,671.34?

A. That is correct.

Q. That is right? A. That is correct.

Q. In other words, you are claiming, by Exhibit 17, that the building, the restoration of the building and what has been described by the Kimball Laundry Com-

pany as power equipment, can all be taken care of and restored so far as repairing is concerned, to the extent just stated, and as stated on Government's Exhibit 17, is that right? A. That is correct.

Q. In that Exhibit 17 and in those estimations, I will [fol. 719] ask you if you have included the following items: the boiler pump?

A. The boiler pump would be included on the heating.

Q. Air compressor?

A. There are three air compressors in the building. Which compressor do you have reference to?

Q. The air compressor that is in the boiler room, or on the first floor near the boiler room. The first floor. Does it include all the air compressors, put it that way.

A. It includes all air compressors that need any further repairs, yes, to put in good and efficient operating condition.

Q. Does it include the boiler control equipment, such as the stokers and air blower controls? A. Yes.

Q. Does it include the main boiler steam headers?

A. Yes.

Q. Does it include the blow down wells for the boilers? A. Yes.

Q. Does it include the repairs, if any you found necessary, to the brick walls under the windows on the east side of the buildings?

A. Yes, that is included under Mr. Alexander's testimony.

[fol. 720] Is that included under Number 1 (g)?

A. That is correct. That is my understanding.

Q. Does it include smoke stack repairs? A. No.

Q. To what extent does it not include it?

A. It includes no repairs to the chimney, if that is what the question is.

Q. No repairs to the chimney? A. That is correct.

Q. Does it include repairs to the office where there has been any removal of equipment of any kind?

A. If I understand your question correctly, you are referring to the office on the first floor?

Q. Yes, for instance, there were desks in there that were removed, oak desks, and the doorway was cut out to take them out?

Mr. Murphy: Object to that as not proper cross-examination, there being no testimony from this witness or any other witness that there were any desks removed and doors cut out to remove them.

Mr. Hotz: We are talking about structural part of the building and whether or not he included it in the building.

The Court: If there is damage there, let us find it out. It doesn't matter whether it comes in proper examina-
[fol. 721] tion, or somewhere else. It should be accounted for somewhere.

A. In regard to the door which was installed by the government in the first floor in the office, I would have to check further to be absolutely certain that this item of restoration is included. It is a comparatively small item.

The Court: When can you do this for us, during the luncheon hour?

A. Yes, sir, it can be ready by two o'clock today.

The Court: Check that, please.

Q. The asphalt tile in the private offices, is that included in the estimate in Exhibit 17 which you have in your hand?

A. Yes, that was included in materials estimate.

Q. And the steel shelf replacement in the call office?

A. Yes, sir, that is included in the machinery, equipment and miscellaneous items.

Q. And the replacement of steel window frames in the shipping room where they were removed?

A. That is included in the rehabilitation item.

Q. Repairs to the electrically operated doors on the east side of the building in the shipping room?

A. No repairs included for that item, it not being considered necessary at this time.

[fol. 722] Q. Does it include the wood covering on the areaway from the shipping room to the basement?

A. Areaway from the shipping room?

Q. I am not trying to challenge your memory. I want to know.

A. I would have to check. I don't identify that item as stated in the question. The areaway I have in mind is from the east side of the building to the basement.

The Court: Is that what you are referring to, Mr. Hotz?

Mr. Hotz: No, he will have to check on that.

The Witness: Will you point out that item?

Q. The supply storage bins in the basement?

A. If I understand the question correctly, you are asking if we figured restoration of bins, to relocate to original position?

Q. Yes? A. Yes.

Q. And repairs on and replacement of steel windows?

A. You are referring to the steel window frames on the second, and perhaps the third and fourth floors?

Q. Second, third and fourth floors, all of them?

A. That has been formerly testified to by Mr. Alex- [fol. 723] ander and Mr. Rorick as to work which is covered and is covered under Item 1 (g) of this exhibit, rehabilitation to building, wire brush clean and reputty steel sash, second floor, east side only.

Q. Damage to the ceiling on the fourth floor due to the hot water tanks from up above running over, or from some other cause similar? A. Yes, we have.

Q. That is all in there? A. That is in there.

Q. With the exception of those two items, then, your statement is that—

A. I will modify that to the extent that the concrete condition has been inspected and the necessary repairs set forth and a further witness will be offered to testify in further detail to the damage, if any, to the concrete roof, the repairs to the plumbing and mechanical equipment for that item having been considered in this exhibit.

Q. You say it is considered in the exhibit?

A. That is correct.

Q. That is included?

A. We considered the damage to the ceiling. After consideration, there was no cost involved other than the repairs to the drain pipe, which had apparently broken [fol. 724] and we figured the cost to replace the trap

which has been broken, for some cause, and replace same with a new item of similar structure.

Q. We got off on that air compressor installation, and lid, and you probably know something about that. If you will turn now to that Exhibit No. 17 again. On the bottom of page 4, Item 27. You have a statement there, "Compressor, Air Installation (Steam Driven)," and then under the total cost and the percentage of repair and restoration, you have nothing. A. That is correct.

Q. To whom does that equipment belong?

A. The steam driven air compressor belongs to the Kimball Laundry Company; that is, there is now installed in the building a number 10½ cross compound duplex steam operated Westinghouse air brake air compressor, which is the same size as was installed in the building at the time of taking.

Q. The other one was electrically driven?

A. The electrically driven compressor, which to my—

Q. Pardon me. Let me interrupt. I don't care about your opinion. I want to know about if the electrically driven compressor wasn't the one that was in there installed by the Kimball Laundry Company.

[fol. 725] A. No. That is the electrically driven compressor on the basement floor. There is an electrically driven compressor on the first floor near the east wall. There are three air compressors in the building.

Q. Which of the three does the government claim its own, if any?

A. The electrically driven C. P. T. air compressor now installed on the basement floor.

Q. That is not the one that is on the bottom of this sheet? A. No, sir.

Q. That is another one?

A. The one listed on the bottom of this sheet, Item 27, has reference to the Kimball owned property.

Q. The Kimball owned property?

A. Yes, it is an exchange item.

Q. What do you mean by that?

A. I mean the one 10½ air compressor was installed in the building at the time of taking, according to the best

nformation, became worn so that certain repairs was ecessary.

Q. What kind of a one was that?

A. It was a 10½ cross compound duplex Westing-ouse.

Q. Was it electrically or steam driven?

A. Steam driven.

fol. 726] Q. This one in Item 27 Exhibit 17 at the bot-om of the page is a duplicate of that one? Is it put in here to replace that one that was destroyed, or not?

A. The 10½ was not destroyed. The 10½ originally in he building at the time of taking by the government be-ame worn and repairs were necessary, and at the time epairs were necessary, there was not a repaired No. 10½ ir compressor available in the city of Omaha, the West-nghouse air brake type air compressor being a locomotive ype. The repair agency for that type of equipment is he U. P. Railroad and I understand the government rep-esentative made arrangements to pay the U. P. approxi-nately $600.00 to furnish a repaired 8½ size Westing-ouse Air Brake compressor, not in lieu of the 10½ size riginally in the building, but the 8½ size has been re noved and a 10½ Westinghouse air brake steam operated ompressor has been installed in a good state of repair, eady for efficient operation, and is now carrying the oad at the Kimball Laundry Company.

Q. Is that a government owned machine? A. No, sir.

Q. That is not a government owned machine?

A. No, sir.

Q. What about the two other compressors?

fol. 727] A. There is a C. P. T. electrical, air driven ompressor which is government owned, installed by the overnment during the time when the 10½ air compressor ent out of operation, that is located on the basement oor, and there is a small air compressor on the first floor. hat compressor, a C. P. T. compressor, is government wned property.

Q. What did it take the place of?

A. Take the place of?

Q. Yes, of the Kimball Laundry Company?

A. It was put in as a stand-by primarily during the outage period of the original 10½ compressor, and an 8½ compressor was put in.

Q. Is there another compressor, still? A. Yes.

Q. Where is that?

A. It is an electrically driven compressor, small size, similar somewhat to the size usually used in filling stations for filling tires. It is installed along the east wall of the first floor.

Q. What is the date of the installation of the repaired steam compressor? When was it installed?

A. About two weeks ago. That machine has been completely repaired and put in first-class operating condition by an authorized exchange agency. That type of equip-
[fol. 728] ment is exchanged as you would do in the case of an automobile. Say you take your car in a shop and he hasn't the necessary part and he makes you an exchange, he gives you a generator in good and first-class condition, and he takes in return your old generator to be repaired.

Q. So that, in this estimate, you included that air compressor concerning which you are now talking, as Item 27, on the bottom of Page 4, Exhibit 17, is that right?

A. I have been talking about three compressors.

Q. I mean the last compressor you were talking about.

A. That is the compressor, 10½ duplex steam driven compressor.

Q. Is Item 27 on Page 5 the steam driven air compressor that has been repaired and put in there in the last two weeks? A. That is correct.

Q. And for that reason, I suppose you put no item of cost or cost of restoration?

A. That is correct. It is operating satisfactorily, having just been repaired throughout in the machine shop, which is the best standard practice for repair and replacement of worn parts of that type of equipment.

[fol. 729] Q. You have the Kimball Laundry Company's Exhibit 21 showing a list of items. That is the exhibit that has the valuations placed on the right-hand column

as of November, 1945, and as they were in 1942, is that right? A. Exhibit 21 shows that, yes.

Q. You took this exhibit and these numbers off here on the right-hand side?

A. I placed the same consecutive numbers on Exhibit 18.

Q. And the same items?

A. That is substantially correct.

Q. With the exception of some little error that might have been made, your idea was to make an exhibit such as 18 so that in referring to 18 you could very readily refer to 21?

A. That is correct, to make it a simple matter of cross-checking.

Q. Exhibit 21 I have, that is the Kimball Laundry Exhibit 21, doesn't say anything about repairs?

A. That is correct.

Q. It gives valuations? A. That is correct.

Q. Of the various items? A. That is correct.

[fol. 730] Q. Your Exhibit 18 is the same items, but a matter of repairs? Your estimate, as it was testified to by you and the others, is the cost of restoring, as you put it, the same equipment that is on Exhibit 21, excepting perhaps in instances where it couldn't be found, or something of that sort, is that right?

A. That is correct, generally speaking, the stated repairs and restoration costs being stated on Government's Exhibit 18, no valuations being placed thereon of the machinery.

Q. All that you do, you put down in one column the parts, if parts were deemed necessary, and the labor; if that were deemed necessary, and the cost of removing the machinery and equipment from one part of the building to another where it was originally located, is that right?

A. And the cost of repairing or replacing any lost items that couldn't be located.

Q. That would be either in parts, labor, or cost of relocating? A. That is correct.

Q. And nothing else? A. That is correct.

Q. That would include it all? A. That is correct.

[fol. 731] Q. And for that you have made a summary on page 31 of $29,471.27? A. That is correct.

Q. Included therein were two items $1750.40 for cleaning and painting machines, and $2020.37 for contingencies, insurance, tools, and so forth. Those two items make $3770.77, is that right? A. That is correct.

Q. I will ask you if it isn't true, as a matter of fact, that it would be virtually impossible to place that machinery and equipment in good working condition, as you stated, for the sum of $20,471.27?

A. You mean machinery and equipment listed on Exhibit 18 can be placed in good and operating condition for that amount?

Q. That is your answer? A. That is correct.

Q. On Exhibit 17, I will ask you, as a matter of fact, if you do not know that the damage to the building and the power plant and the other items that go to make Exhibit 17, could not be placed in a good state of repair for the sum of $39,188.81, your figure for the government's part of that expense being $34,671.34? I am asking you again whether or not it isn't true that it couldn't [fol. 732] be placed in a good state of repair for that sum?

A. It is true that it can be placed in a good state of repair for that amount. There are a few items such as the chimney which have been mentioned—

Q. In the cross-examination we have been having here this morning? A. That is correct.

Q. There can be no doubt about the fact, I guess, Mr. Witness, that quite a lot of this machinery that was in the plant down there was sent away from the plant for some reason or another to be stored, and on some of your exhibits you have Fort Omaha, for example—

A. Which do you mean?

Q. I am talking now about—you will find it on your Exhibits 10 and 11, and which were summarized in Exhibit 18—some of the equipment originally in there was stored—

The Court: There were 107 pieces, I think he said.

Mr. Hotz: He said 107 and our record shows 178 pieces and we will get to something on that.

The Witness: May I add this, that 107 pieces included the different types of items as listed on the inventory at the time the equipment was moved from the building, not [fol. 733] the quantity of those items. In other words, they may have several different types of the particular description included.

Q. The source of your information was the quartermaster record there in the Kimball Laundry Company, I presume, and you didn't know anything about it personally?

A. It was not the quartermaster record. It was from the engineer's records.

Q. What engineer?

A. United States Army Engineer, Real Estate Division.

Q. That would be your office? A. That is correct.

Q. So, the source of your information was that list that was furnished by the quartermaster corps in charge of the laundry when the equipment was removed?

A. I don't state exactly who furnished the list. The list was furnished and found in the record file stating certain items had been transferred to storage at certain designated places. Those items were checked personally by the witness.

Q. I understand. Do you know where it was first taken, whether it was 107 or 178? Let's not get into difficulties of that kind. We will try and straighten that out, but do you know where it was first taken and stored?

[fol. 734] A. According to information available, from reliable sources, it was first taken to a Seventh Service Command warehouse on Cumings Street.

Q. 16th and Cumings?

A. That is approximately correct. It is on Cumings Street.

Q. Then it was removed from there, was it not?

A. That is correct, with possibly the exception of a

few items that were added to the storage list at a later date.

Q. Then it was taken by the army out to the river warehouse out at Florence, wasn't it?

A. That I could not testify to.

Q. You don't know that?

A. I know I inspected it personally at the warehouse at Fort Omaha.

Q. That is where you saw it? A. That is correct.

Q. Do you know whether it had been moved to still another place before it got there A. I do not.

Q. I will ask you to state whether or not—

A. I can find that information.

The Court: Don't you have in your office in the record down there an official record showing where this prop-
[fol. 735] erty was from time to time until it finally lodged where it is now?

A. That record which we have states that the majority of this equipment referred to, moved to storage, was stored at Cumings Street and then it was moved.

The Court: You have such a record?

A. I can verify whether it was moved once or twice or three times, if that is the information you wish. To my knowledge, it was moved from Cumings Street to Fort Omaha and back to the Kimball Laundry.

The Court: That is within your personal knowledge, is it?

A. It is from the records, available records.

Q. Calling your attention to Defendant's Exhibit 45, consisting of three pages, saying "Items of machinery and parts moved from the Omaha Quartermaster Laundry to Warehouse, in care of Lt. Wyatt," and it purports to be a copy, of course, of their record, I will ask you if you can verify that for us? Do you have the facilities in your office to verify that?

Mr. Murphy: If the court please, if counsel will let me see the exhibit, I think I am perfectly willing to admit it in evidence.

The Court: Very well.

Mr. Hotz: Certainly he can see it. That is what we [fol. 736] want. If you can admit it, that is what we want.

Mr. Murphy: Subject only to a check when more time permits, of one or two minor items, we have no objection to the exhibit.

Mr. Hotz: We might as well offer it in evidence, to get the record straight at this point. Respondent offers as Kimball Laundry Exhibit 45, a list of machines removed from the Kimball Laundry Company by the Quartermaster Corps, after the taking.

Kimball Laundry Exhibit 45, found in Volume III, at page 1088.

[fol. 1088] D. EX. 45 (Received)

ARMY SERVICE FORCES
Seventh Service Command
Omaha Quartermaster Laundry
Omaha, 2, Nebraska

5 March 1945

Items of machinery and parts moved from the Omaha Quartermaster Laundry to Warehouse, in care of Lt. Wyatt.

4—each Shake out racks for flatwork ironer
7—Ironing boards and stands complete
1—4 compartment hand wash tubs complete
1—4 booth sorting bin
1—narrow cabinet, open face
1—blind stitching sewing machine, Singer
1—hat stitching sewing machine, Singer
1—standard stitching sewing machine, Singer
3—large ironing boards, complete with stands and apron holders
6—marking department waste baskets, woven metal
3—bag or net holding racks
6—marking table tops
1—4 ft x 6 ft x 1 ft white cabinet, hat blocks
1—wet spotting board wood 2 x 4 feet, legs

1—collar former and stand
2—knit steam tables complete
1—collar finishing table complete with motor shafting and five collar finishing machines
1—velvet steam-blower complete with steam spray attachment and all parts
1—double coat sleeve ironer on stand complete (American Mach.)
1—silk spotting table complete with marble slab, complete with stand
1—Tiltor shirt folding table complete
1—Heubsch handkerchief shaker complete with stand and motor
2—shirt form-right collar shapers
1—sox stand with two sox ironing forms
1—bag holder for marking booth
1—shirt folding table 3 ft x 4 ft
1—dressmakers dress form
1—wood horse on wheels
3—hat racks for hat department
1—dress form dress stretcher
2—pieces of carding cloth 3 ft long
2—sorting rack tops boxes only, 36 boxes in each rack
1—full dress shirt ironing table
1—starching table
2—drawers for table 20′ x 20′
1—ironing board electric plugs, 2 outlets
2—pre-sorting tables 30′ x 6′
1—box rack from wrapping table 4 x 5 ft.
2—open face cabinet (one) 4 part) 7 ft high
(one) 6 part)
1—metal hopper for scale
1—curtain (roller only)
1—Cissell puff iron stand 3-heads
1—Fry tagging machine
1—dry cleaning sleeve blower Ser. No. 103925
1—Hoffman steam board Ser. No. 74424
1—small stool 28 x 28 inches
1—wood marking booth
1—small stand with two doors

1—base for ironing board
1—starch extractor with motor Ser. No. 3322M2019
1—rough dry assorting wheel complete, consists of 4 large pieces 1 box of assorted bolts, 6 pieces of angle iron 2½" x 2" 8 brace rods ⅜' x 1½' flat iron 50-5/16 x 5/16 x 40" sq. sorting rods 12 pre-sorting hooks for same
3—oak wood desk tops, complete with brackets out of routemen's room
11—screen frames for floors
5—shake out boards for 6 roll flat-work ironer
1—r. tal dry house complete with fan hangers, bars and coils
1—small bench 12 inches high 12 x 24
1—elevator cabinet
1—padding rack, cabinet and top
2—W9 sewing machines, complete
2—sets of flat-work ironer shake out frames
5—steel wet wash bag or net holders
1—10 foot length conveyor track, steel
1—circular metal pin holder
7—marking booth net holders
5—Fantom Fast curtain holders for marking booths
2—flat-work ironer brace rods
2—team ironing boards large, with holders
1—pre-sorting tables, 3 parts
1—wood marking table with assembly
1—Singer Blanket tape sewing machine, Ser. No. G4194778
2—ironing boards with stands
1—curtain and blanket rack wood, 6 parts
1—electric contact for ironing board
1—6 parts, pre-sorting table with booths and cabinet complete
2—white cabinet white elevator racks
1—small rack white wood 20 x 30 inches
1—roller towel rolling device on metal stand
1—rack, two tiers 3 bins each
1—back extractor motor drive Ser. No. 1483326
1—Heubsch Dry House #925, motor and fan, metal

2—J. W. Steele Co. shirt folding boards with electric con. for irons
1—wet wash Bagging table
1—sewing machine blanket binding stitcher, Lawrence M. Stein Co. # 24067, and 4 spool holders
1—Singer sewing machine and portable motor #K680519, with spool holder
1—sewing machine Singer No. K360992 motor and spool holders
1—rack, tank and hookup for Chlorine bleach making machine
1—hand wash tubs Cypress, 3 sections
1—eight section wood dry cleaning bin
1—Zarmo collar press No. 65M37668
1—Extractor 26' inch (American) with 1 9/10 H P motor, complete No. 4129402
1—wood table 5 ft. x 5 ft
1—Oscilla washing machine #618 Mod A2
1—Poney washing machine 30 x 38, no motor, cast iron frame, wood shell only
1—Heubsch handkerchief shake out tumbler, complete with motor Ser. No. 2084
1—wood extractor table
1—Eagle press Mod 61M No. 14434-5
1—Extractor 24 inch, starch motor driven, complete No. 1029, Type 77K
1—Record case, 2 drawers, 2 glass doors
1—Zarmo press Mod 55 Ser. No. 65M37699
1—dry cleaning checking desk, oak, 3 drawers, 1 shelf
1—curtain ruffle ironer and motor #309; 1/10 HP motor Ser. No. 21459
2—tables for hand iron linens, complete with electric fixtures
1—curtain flutter [fluter] (noxant) foot control with motor 1/15 HP Ser. No. U47215-A
4—fixtures for electric ironing boards
1—tub, wood, two sectioned
178 items to Ft. Omaha

Q. Turn to page 2 of Government's Exhibit 18, and Item 25, which is a gasoline pump and tank, which I think they have stated was on the east side of the building on the outside? A. That is correct.

Q. You assert, according to your exhibit, that that pump and tank can be repaired for $13.25 in parts and $8.30 in labor? A. That is correct.

Q. I will ask you to state as a matter of fact—

A. There may be a slight variation, very minor.

Q. —whether that gasoline pump and tank is of no value, that the trucks have backed into it and broken it down to such an extent that it would cost more to repair [fol. 737] it than it is worth?

A. I would appreciate your repeating the question.

Q. I am asking you—

The Court: Read the question.

A. The gasoline pump and tank is of value.

Q. How much? A. How much?

Q. Yes?

A. I would have to make further computations. It depends—to who and what use.

Q. I mean the use as a gasoline pump. It has had other things in the tank besides gasoline, hasn't it?

A. Yes, it has naphtha now stored in it, according to my understanding, and we estimate the cost to remove the naphtha and put the pump back in condition to permit storage of gasoline—

Q. You think that could be done for $13.25 in parts, plus $8.30 in labor?

A. It is my considerate opinion it could be done, to put the pump in operating condition, with small variations.

Q. Turn to Item 54 on Page 4, call shelves. I will ask you if it isn't a matter of fact those shelves are [fol. 738] entirely gone?

A. Those shelves are located in the soap room on the fifth floor.

Q. In the soap room on the fifth floor?

A. At the time of this survey, yes, sir. It is a question of bringing them downstairs, reassembling them and putting them in the original position.

Q. You think they are in the building? Are they set up and being used in the soap room?

A. They are in storage in the soap room.

Q. Just in storage in the soap room?

A. That is correct. The government is not using the call shelves.

Q. Again, I will ask you if it isn't a fact—

A. That is, they aren't using all of them.

Q. Isn't it a fact they are not there at all and the lumber has been broken up and used for other purposes?

A. I am referring to steel call shelves. If you are speaking of wood call shelves, that is a different matter.

Q. Going to Item 72 on Page 5, 3 shelf magazine rack, I will ask you if it isn't true that is no longer in the building at all? It is destroyed and gone?

A. It is true we could not locate that item in the [fol. 739] building, but we checked with Mr. Jacobberger, and the best information we could get was that it was removed from the building by its owner.

Q. By its owner?

A. Yes, it is my understanding that was said by Mr. Harry Jacobberger.

Q. Will you please turn to Items 112 and 113 on Page 7. A. Items 112 and 113?

Q. Yes. The first one is a metal dryer room approximately 6 x 6 x 8, and you have set up for parts $47.68, labor $48.00, relocation $12.64. I will ask you, as a matter of fact, if that isn't completely destroyed and gone?

A. To my knowledge it is part of equipment that was brought back from Fort Omaha, now located on the fifth floor, and shown as Item 36, in my considerate opinion. There is a difference of opinion there between Mr. A. L. Jacobberger and myself but he could not prove to me conclusively it is an item other than 36; therefore, I have not figured it.

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Q. The difference between you and Mr. Jacobberger was that you were not here in 1942?

A. That is correct as far as that is concerned.

Q. Let's go to 113. That was put in there in 1942, according to the records, assorting reel National marking [fol. 740] machine, and you say for that, parts $174.83, labor $46.00, relocation cost $59.25. I will ask you, as a matter of fact, if that machine isn't disassembled and of absolutely no value whatever, just for junk?

A. The machine is disassembled now located on the first floor of the Kimball Laundry. The cost included charges to reassemble the machine in its original location to serve its original function.

Q. Do you know if it was disassembled who disassembled it? A. I do not.

Q. What is it made of?

A. Mostly steel parts of different shapes, and a revolving platform. It is known as a marking reel, as stated here. No particular manufacturer, as I can determine it, has a National marking machine, but I am informed it did not manufacture that particular item. I inspected the equipment and have made ample estimate to reassemble it and relocate it in its original position.

Mr. Murphy: If the court please, may I have the witness for a few questions to correct one item in this Exhibit 17?

The Court: Is there objection?

[fol. 741] Mr. Hotz: None whatever.

The Court: Very well.

Redirect Examination of C. R. Crowder by Mr. Murphy:

Q. Mr. Crowder, you were asked this morning to check certain floor area. Have you, during the noon recess, rechecked the entire floor area and different figures on it? A. Yes.

Q. Do you find as to the National Roofing Company bid for the mastic flooring of the washer rooms or department that they apparently omitted some portion of that from their figures? That is correct.

Q. How many square feet was included in their original figure? A. 4400 square feet.

Q. Does that we are talking about include the guttering and that particular part of the floor?

A. Yes, that includes the mastic and waterproofing and guttering and the washer aisles on the second and third and fourth floors.

Q. Is that the area marked in red on Exhibit 9?

A. Yes, the discrepancy being that the National Roofing Company stated that they only included the cost for the mastic and waterproofing and guttering on the sec-
[fol. 742] ond and third floors, whereas, we had asked them for a price on the second, third and fourth floors, which would be a total of 5860 square feet as compared with 4400 square feet even.

Q. That, I take it, of course, would increase the amount of that item also proportionately?

A. Yes, that increases the cost of that item for the mastic and waterproofing and washer aisles for the second, third and fourth floors.

Q. Government's Exhibit 17 has that item figured at $9800.00? A. That is correct.

Q. Including the additional area on the fourth floor, which was asked for by you, but omitted by the National Roofing Company in their figure, to what figure is that increased? A. To a total of $12,650.00.

Q. Making an increase of $2850.00?

A. That is correct, over and above the $9800.00.

Q. So, the sum of $2850.00 should be added to the total of $34,671.34 on Exhibit 17?

A. That is correct, for that item.

Mr. Murphy: At this time we ask leave of court to amend the exhibit by adding that figure to show the corrected amount.

[fol. 743] The Court: Very well. It will be permitted.

Mr. Murphy: We would like to have the record show that Exhibit 17 has been corrected so that on the second page thereof Item 1 (f) reads 5860 instead of 4400 square feet, the total cost under the first column being

$12,650.00 instead of $9800.00, and the same correction in the right-hand column on that page, and that the footings at the bottom of the last page of the exhibit proper, the total cost of repairs in the left-hand column now read $42,038.81, and in the right-hand column, which is the cost estimated to the government, as corrected, $37,521.34.

Cross-Examination of C. R. Crowder by Mr. Hotz (cont.)

Q. Kindly turn to Exhibit 18, which you had in your hand when court adjourned, and drop down to Items 118, 119, 120, 121, 122, 123, 124, 125 and 126. I will ask you if it isn't a matter of fact that none of those items listed are present in the Kimball Laundry Company at any time that you have had anything to do with it, and are not there at the present time, so far as you know?

A. Yes, there are some present and there are some which were in such bad state that we figured the new restoration cost.

[fol. 744] Q. Give us what your conclusions are by referring to the items, 118 and page 7, and it runs on through 126 on page 8? A. Inclusively?

Q. Inclusively?

A. Well, the Item 118 was located and relocated in its original condition was figured.

Q. Where was it found?

A. It was checked at Fort Omaha and in the final compilation was checked in the laundry.

Q. That is a piece of equipment you say came back from that which had been once removed?

A. I say the piece of equipment is in the laundry building at the present time, at the time of this survey, and the relocation for it is fixed.

Q. It is a table, 40 x 12? A. Yes.

Q. Isn't it a fact it was broken down and the lumber used? A. It was not a broken table.

Q. Next, 119.

A. 119, index rack and two victor cardex. That was found in fair condition in the laundry building.

Q. And where is it?

A. It is in the laundry building at the time of this survey.

[fol. 745] Q. Where?

A. That item is stored in the women's locker room on the fourth floor.

Q. Where did you get your information from?

A. By actual inspection.

Q. Yourself? A. Yes, sir.

Q. All right.

A. Item 120, "U" shaped table basket loader 5 x 5. That is now located on the second floor by the Notrux extractors, needs repairs in the amount of $1.48 for materials and $4.35 for labor and other expenses. Item 121, Table 42 x 40, found and checked at premises, as removed to third floor, relocated and cost for relocation figured. 122, table 30 x 63, now on fifth floor, relocated. Item 123, wrapping table and rack, metal top and paper rack and bag rack at side with rubber casters. Moved to fifth floor, relocated.

Q. Is that where you found it, on the fifth floor?

A. Yes, sir. Item 124—

Q. Did you find it?

A. Yes, sir. Item 124, 32 inch pedestal key pin rack, circular metal, stored on first floor and repaired and relocated. 125, bin top table 30 x 68, stored fifth floor, re-

[fol. 746] pair and relocate. Item 126, bin top table—

Q. On Item 125, you put in, parts $3.31 and labor at $19.10, and cost of relocation $.85, about $23.00?

A. $23.26, total, stored on fifth floor, repair and relocate.

Q. You know the item was listed at its original cost at $25.00, don't you?

A. I don't have that on my records. I am not concerned with that.

Q. $20.00 in 1942, according to Exhibit No. 21?

A. I am not concerned with the value at the time of taking.

Q. Did you give 126? A. 126, bin top table 30 x 68".

Q. What I want to know, when you give the answer, tell us where you found it? A. That is where?

Q. Very well, where?

A. I found it on the fifth floor store room, repair and relocate, total amount $9.85.

Q. 131, I will ask you if it isn't true that that item which is a moving table 24 x 40 with electric connections, is gone completely? A. No, sir.

[fol. 747] Q. Where did you find it?

A. We found it in the building, relocate.

Q. Where in the building?

A. I don't have the information on the floor. It can be checked if such is required

Q. Jump to Items 136 to 148, inclusive. I will ask you to state if all of those items from 136 to 148, inclusive, on page 9 of Exhibit 18, are not, as a matter of fact, not present and are all gone or destroyed and are not in the building and haven't been for several months? Without giving the specific items, just state whether or not you have located all of them, or none of them, or which you have located?

A. We have located some of them. We figured cost to repair and relocate on some of them.

Q. I am not asking you about what you figured to repair and relocate. What I am asking you is where you found them?

A. We found 136, roll top desk, in the building.

Q. 136 is 8 sorting bins, page 9, Exhibit 18.

A. Now on the first floor, repair and relocate.

Q. That would be back from Fort Omaha, you think?

A. I said it was now on the first floor, repair and relocate, 8 sorting bins. They may be in such a state [fol. 748] of repair as to be valueless. They can be pointed out, if desired. Cost of $40.29 to repair and relocate, total.

Q. 138, you can hasten through them and make time—take them one after another, if you will, and tell where you found them?

A. 4 wrapping tables 42 x 42, found in the building. That type of equipment was moved from floor to floor in production and operation of that type. The next two

items found in the building. Item 141, if I understand correctly, is not questioned?

Q. Yes?

A. Open shelf racks 18 x 36", height 6'6", stored first floor, clean and relocate. Next item, cabinet, 36 x 16, height 6' 6", metal two-door, located in the building. Next item, open front shelf cabinet 19 x 20, height 6' 6", stored first floor, repair and relocate.

Q. Any further items? A. Right.

Q. Go right on down, 144, 145, 146, 147, 148.

A. 145, worth $18.00. We found it. 146—

Q. What was 144, locker 12 x 20?

A. Now on fifth floor, relocate.

Q. 145?

[fol. 749] A. Bin table 36 x 26", height 36", stored first floor, repair and relocate. Slat bins, dismantled by government, rebuilt, $32.42.

Q. Have they been rebuilt? A. No, sir.

Q. You said "rebuilt" and I thought maybe—

A. That is what the estimate covers, the restoration which has been tendered as evidence previously, covers the cost for rebuilding this particular item and other items.

Y. What was the cost for fixing it up? A. $32.42.

Q. It cost new $22.50, according to Exhibit 21.

A. These costs are reproduction costs. That means regardless of what they cost new.

Q. Go ahead, 147? A. 147, slat bins, dismantled.

Q. The same as 146?

A. Right, except cost, $38.34. Understand, there are certain portions of these items that may be available.

Q. 148 counter scale and stand, 32 x 21", height 35", serial number, and so forth? A. Repair.

Q. Where is it? A. Found in the building.

[fol. 750] Q. Where?

A. Fifth floor, as I understand it. That will have to be checked to be absolutely correct.

Q. You have been reading from a document that you have in your hand? A. I am reading from my work sheets.

Q. That you yourself made? A. Yes, sir.

Q. In your own handwriting?

A. Typed. I have my handwriting here, if you wish that.

Q. I am not questioning that. I am asking you if you made it yourself?

A. They were made under my direction, under my direct supervision, as the result of pencil computations, notes that were taken during the survey and actual inspection.

Q. But not all by yourself?

A. Under my direct supervision, with the assistance of my several assistants.

Q. Turn to 153, I will ask you, as a matter of fact, if that item, which is a wrapping table, isn't gone completely? A. Moved to third floor, relocate.

[fol. 751] The Court: Is it gone completely, is the question.

A. No, sir, it is located in the building.

Q. There are two items, 161 and 162, on page 10. There are two Lane canvas bag work trucks, 26 x 30, and 38" women's lockers, steel, approximately 38 x 12 and 6' 6" high. I will ask you to state if it isn't true that while they are there, they have been completely destroyed? Pieces of them may be found but they are of no value?

A. Item 161, we find, of course, trucks of that dimension and description located on the property in good condition. It is true there are perhaps some trucks of that particular description which are in bad repair, which have been figured new cost or repair cost at other points in this survey.

Q. But you say both of these items 161 and 162, according to the report, have a "G" after them, which means the condition is good?

A. That is correct. That is a movable item from floor to floor.

Q. Yes, it has wheels on it. It did have rubber wheels on it, is that right?

A. That is right, to all practical purposes.

Q. What about the 38" women's lockers?

Mr. Murphy: Pardon me a moment. I object to the [fol. 752] question as to 162 for the reason there on Exhibit 21, it shows it present and still of full value.

The Court: I don't know that that is a valid objection. Overruled. What did you ask him?

Mr. Hotz: I asked him where they are?

A. 38 women's steel lockers, they are on the third floor, with minor exceptions. In other words, those lockers have been moved, in some instances, from the second, third and fourth floors, there being women's locker rooms on all three floors, and men's locker rooms, and they have been moved around between those rooms, but we counted a total of that type of lockers in the building and find this number of that type of locker present in the building, although we had figured that some of them had been moved from one floor to another and figured a $3.00 charge to relocate. You understand, this item is not anchored to the floor. It is just a matter of common labor, bringing it from one floor to another and putting it where it was originally. We figured it would cost, whether or no.

Q. 158, twelve canvas bag trucks? A. 158?

Q. Yes. I will ask you if it isn't true they are of no value whatever? They are there but of no value, all [fol. 753] destroyed? A. They are being used.

Q. All twelve of them?

A. Yes. They were at the time we made the survey. They may have been worn out of a state of repair since the survey.

Q. Describe what one of them looks like?

A. A canvas bag truck?

Q. Yes?

A. A canvas bag truck is a truck with a steel outrigging, with a canvas inner lining, arranged to hold laundry, either wet or semi-wet.

Q. How tall are they?

A. They are various sizes. These have no dimensions

on them. Why should I explain the description when there is no description here?

Q. You say they are there?

A. That is correct. They are there; at least, they were there at the time this survey was compiled, between the period of December 15th and March 1st.

Q. The Quartermaster Corps is still in charge and has been since that time?

A. Yes. These items are expendable items, incidentally, and are replaced from time to time as they are expended, but really they should not be on an inventory [fol. 754] list of this type, if the correct listing is carried out, but they are here. Some of these items have been purchased by the government.

Q. Since you have spoken of that, I will ask you to turn to Items 156, 157, 361, 362, 492, 493, 494, 593, 163 and 164, and state whether or not those were all baskets, ordinary baskets such as are used in a laundry, and if those are not the only items on the entire list in Exhibit 18, Government's Exhibit 18, and Kimball Laundry Exhibit 21, that were paid for or purchased by the Quartermaster Corps, and I will add to that, if my questions to you and your answers about being expendable, if any of those items were included on the items I spoke to you about?

A. You will have to state that more simply, please.

Q. All right. I will ask you to state again if Items 156, 157, 361, 362, 492, 493, 494, 593, 163 and 164, which you have already looked at, are nothing more or less than laundry baskets that were paid for by the Quartermaster Corps to the Kimball Laundry Company?

A. They are laundry baskets generally paid for by the government, in most instances.

Q. I will ask you if those aren't all of the items on the entire list that were purchased by the Quartermaster [fol. 755] Corps with cash to the Kimball Laundry Company?

A. It will be necessary that I make a cross-reference to the purchaser of the items in order to answer that absolutely correct.

Q. You have to do what?

A. Make a cross-reference to the total. In other words, items of this type have been accumulated from this list and add it to a purchase order purchased by the government.

Q. But from the description of them, if you have them on your list and what they are, about 135 baskets and buckets, of which eight were just ordinary G. I. buckets? A. Yes.

Q. Generally, ordinary baskets and buckets?

A. Generally that would cover the items purchased by the government. I will have to check the absolutely correct number purchased by the government.

Q. I have given the item numbers and if you didn't take them down or check them on your list, we have a list you may have and check them from that. Turn to No. 179, same question as to that. I will ask you if it isn't true that that item is no longer in the Kimball Laundry and hasn't been for a long time?

[fol. 756] A. Relocate, at time of survey.

Q. Where? A. In the building.

Q. That is as far as you can give us? If you can give us the floor, or where, I would appreciate it. If you can't, okeh. A. Stored on first floor, repair.

Q. Is that one of the items that went out to Fort Omaha? A. Yes.

Q. Do you think it came back with that group? A. Yes.

Q. Turn to 233, double sleeve former. I will ask you if it isn't a fact that that item cannot be located any more at the present time, on page 15 of Government's Exhibit 18? A. Stored on fifth floor, repair and relocate.

Q. Jump to 256, 257 and 258, on page 16 of Government's Exhibit 18 and I will ask you if it isn't true that all three of those items, six hand marking cages woven metal baskets, wood chute, marking cages, and 12 underwear frames, are no longer available to anybody for any purpose?

A. Item 256 could not be located. 257 could not be located. 258 could not be located. Replacement costs were figured therefor.

[fol. 757] Q. You didn't tell about the six hand marking machines, 256, hand marking machines?

A. Woven wire metal baskets, those are woven wire metal baskets for hand marking cages.

Q. Can they be located, or not?

A. The cages were not located, but the woven metal baskets were and we figured repairs to the woven metal baskets and replacement costs, as I recall, of six hand marking cages, wooden and steel parts.

Q. Going to Item 261, a starch table. I will ask you if it isn't true that is no longer available?

A. We found it in the building and figured the relocation.

Q. Jump to 263, and tell us, if you can, where you found the wood laundry trays?

A. Stored, fifth floor, replace and locate to original position, a matter of $145.05. We figured new tubs. The tubs are in a bad state of repair, having not been used. A tub of that type should remain wet to retain its tightness. Due to the fact that the government put it out of service for a certain amount of time, we are figuring replacing them of new quality.

Q. They are not there?

A. The old tubs are not there, but it is not considered [fol. 758] they are in condition for efficient operation, so we figured in modern equipment of that type.

Q. Jump down to 291 to 311, inclusive, and I will ask you to state whether or not all of the items stated between those numbers are not gone and cannot be found and if they are, there are only pieces and parts that would have no value? A. 291, through 311, inclusive?

Q. Yes, consecutively numbered. They are wrapping tables, sorting tables, sorting bin shelves.

A. Items 291 and 292 are located in the building. Item 293, sorting table, moved to second floor to store sorting cubicles which have been removed. Item 294, sorting table, moved to fifth floor to store sorting cubicles which have been removed. Item 295, sorting bin and shelves—

Q. If you would just please give the floor number where they now may be found, so far as you know?

A. I will give the floor number where they are found at the time of the survey.

Q. That is what I wanted.

A. Moved to delivery room, place back in original location and repaint, $1.80. 296, sorting bin shelves. The same holds true for 296, 297, 298, 299 and 300. 301 now [fol. 759] located fourth floor, repaint and relocate. I stand corrected. That is only a relocation. 302, sorting table, now in soap room, and repair. 303, now on fourth floor, relocate. 304, located on fourth floor, relocate. 305, dismantled by government, restore. 306, located in delivery room, replace, paint same, relocate. 307, located in delivery room, included under 295 cost. 308, 309 and 310, located in building. 311, disassembled by government, restore. 312—

The Court: He just called for 311.

The Witness: I beg the pardon of both of you.

Q. Jump to the next, 326 to 331, inclusive, page 19 of Government's Exhibit 18. I will ask you if it isn't a fact all of those items are gone and can't be located at all, except pieces which are of no value whatever, consisting of bin, 326, and rack top table and so forth?

A. The first item, stored on fifth floor, repaint and relocate. Next item, located in building. Next item, located in building. Next item, located on second floor, relocate. Next item, stored fifth floor, relocate and repair. Next item, locate in original position.

Q. Jump to 336, 337, 338 and 399 [339], and I will ask [fol. 760] you if all four of those items, consisting of wall slat bins, wall slat bins, rack top table and scrub table, are not gone and destroyed?

A. The first three items were dismantled by the government, restoration cost has been figured and included.

Q. What do you mean, dismantled by the government? Broken up?

A. Broken up or modified it; in other words, changed it around.

Q. You mean used the lumber or something else?

A. I don't know whether they needed lumber for something else, or whether the bins were in the way. Anyway, they are not there.

Q. 342, two shelf rack, 24x48, five feet high. I will ask you if it isn't true that is gone?

A. Found that item stored on the fifth floor, figured relocation cost.

Q. In glancing over these various items as we go along, I wish to direct your attention to the fact, for example, to 344, and 343, and many other similar items that are identically the same in description and size, that are there and recognized on this exhibit and our exhibit as being present, and if they are not identically the same in di- [fol. 761] mensions, and so forth, as some of those up above, like 328 and 329, as to size and so forth—

A. They are of various sizes; there is some variation in size.

Q. And some are exactly alike?

A. That is correct. Naturally, in making an inventory of this type there were a few discrepancies in putting down dimensions and descriptions, but very minor, bearing in mind there were approximately 700 items or more.

Q. Going to 353 and 354, and I will ask you if the sorting bin shelves, 28x48 and 26x38 are not gone?

A. The sorting bins, 353, were located. The chemical table was stored on the fifth floor and we figured relocation cost. However, there was a slight discrepancy in the size for the item we found. The original dimension shows 24x28 and in our opinion it was 36x38.

Q. Would you please go to Item 355?

A. Pipe hanger rack 230 lineal feet.

Q. Isn't that gone?

A. Some of that has been removed and the replacement cost in its original kind has been figured at $96.54.

Q. Go down to Item 359, and I will ask you to state if that and the following item, 360, which consist of 47 [fol. 762] canvas back trucks and 24 canvas back trucks, with wheels, are no longer there and no longer available, and if they are, some parts of them are of no value for use?

A. The description of the item does not state that the canvas back trucks have wheels.

Q. Do you know whether they do or not?

A. The items which we checked for this item do not have wheels, in our opinion.

Q. The items you did check for 339 and 360, where did you locate them? There are about 75 of them?

A. They are all there, scattered throughout the entire building; that is, the second, third and fourth floors, counted in total at a time when the laundry—on Saturday, when the laundry was not in operation. It was impossible to count that type of equipment when the laundry was in operation. Check was made by three men and double-checked in order to get this tabulation as accurate as humanly possible.

Q. 368, Wallace Tiernan Bleacher, chlorine bleach mixer? Isn't it true that is totally destroyed?

A. It is not totally destroyed. The tank and the steel mounted frame is still there. Additional parts and gauges and electric equipment and switches and other pertinent [fol. 763] equipment, part of which was a leased item, are not present, the procedure having been, to lease, in the majority of this portion of this item, so much a month to commercial laundries, according to the manufacturer of this type of equipment, Wallace Tiernan Company. It is a common chlorine bleach mixer. The tank is there and the tank, only, located on the first floor, with the steel braces and protecting upright steel pieces, with a chain to fasten the tanks in an upright position, two special needle valves on the tank, and the cost to replace the lost parts, regulate valves, gauges and other miscellaneous items, $152.80, and verified by the manufacturer as being more than ample to replace this particular type of equipment, having recently quoted a cost for restoring a similar item in a similar laundry in the past two months, and I am talking about the restoration figure by the government.

Q. You are talking about parts and labor?

A. That is correct. That does not include the chlorine

gas cylinder, which is generally a rental piece of equipment by a chemical manufacturer.

Q. Please turn to Items 374 and 375 on page 21, Government's Exhibit 18, which are five stools, chairs, 2 desk [fol. 764] and 2 plain, and I will ask you if it isn't true that they are gone completely?

A. We located five stools, one of which was broken and needed repair, the cost of which was $2.75.

Q. Where were they located? A. On the fifth floor.

Q. Is that true with the next item, 375, fifth floor, too?

A. That was found in the building in satisfactory condition.

Q. What? Two chairs—

A. Two desk chairs and two plain chairs.

Q. Turn to Item 390, Cesell Puff Ironer, and I will ask you if it isn't true that is gone?

A. That item stored first floor Kimball Laundry, figured cost of restoration, $21.75.

Q. Turn to Item 437, on page 24, wrapping table, top bin shelf and rack, and I will ask you if it isn't true that is gone completely?

A. Yes, that needs to be restored, rebuilt. We could not locate that item. Amount $35.64.

Q. 444, oak bookkeeping desk, I will ask you if it isn't true that is destroyed and gone?

A. That is stored fifth floor, needs repairs, which we figured $8.00 material and $44.64 labor, total $52.64. [fol. 765] Q. The item was listed at $35.00?

A. Yes, and we figured a replacement cost of $52.64 for a $35.00 item.

Q. Item 446, 1942 plywood bin, one, and I will ask you if it isn't true that is gone, and also the next item of 447, 1942 plywood bin, large bins, if they are not gone or broken down and used for some other purpose?

A. Those two items, plywood bins, 7'3"x30"x28", are now stored on the fifth floor, cost to repair and repaint and relocate figuring a total of $20.95 for the first item, No. 446, and $21.35 for item 447.

Q. Item 449 a tool table with drawer, and I will ask you if that isn't completely gone?

A. Tool table with drawer found in a tool room, value of which was $18.00. No restoration figure, tool room, first floor.

Q. Turn to 474, shelf bins, isn't it true they are destroyed and gone completely?

A. Shelves or shelf bins, width 8 feet, depth 2 feet, height 6 feet, these bins have been dismantled by the government and replacement costs have been figured in the amount of $26.00.

Q. If I asked you what "dismantled" meant, I suppose [fol. 766] you would give me the same answer as you did before—you don't know what became of them?

A. That is substantially correct.

Q. 478, scrub table; 481, scrub table; I will ask you if it isn't true that they are gone?

A. 478, scrub table, located on fifth floor, cost of $2.00 figured to clean and relocate. The next item is now on the first floor of the laundry and to repair the top, an amount of $4.75 was figured.

Q. 483, a rack 57" high, 6' 6" wide?

A. Slat three shelf rack, 6' 6", 20" deep, height 57", it was found in the building. No restoration figured.

Q. Where in the building?

A. I do not have that definite information.

Q. 486, cupboard, 56" wide, 6' high, 3' deep. I will ask you if that isn't gone completely?

A. Yes, that can not be located, and an amount of $30.00 was figured to replace that item.

Q. 488, 1941 spotting tube, I will ask you if it isn't true that that is gone, an instrument or tube to look through and discover spots in silk?

A. That item was located in the building.

Q. Where? A. On one of the various floors.

[fol. 767] Q. Drop down to 497, isn't it true there are six trucks—steel bags, gone? No. 497 that couldn't be found at all?

A. We located six trucks, steel bags, in the building.

Q. There are many six trucks, steel bags, in that building, are there not? A. That is correct.

Q. 499. I will ask you if it isn't true on 499 and 500, three stools and three chairs, two desk and one plain, are gone?

A. We located three stools which met this description, which states simply, "3 stools," stored on the fifth floor. 500, three chairs, two desks and one plain, we located those items in the building.

Q. Do you know where?

A. In the building at various locations, being movable articles.

Q. Please answer whether or not Item 502, which is two nutting trucks, are not completely gone and can't be found?

A. We located these two nutting trucks in the building. They are movable items, mounted on wheels, de- [fol. 768] signed especially for lifting baskets and setting them down.

Q. Item 504, eight clocks on dryer and tumbler. They are measuring timers. Isn't it true they are gone and also the wall clock, being 505? 504 is gone completely, the eight clocks on the dryers and tumblers?

A. We located some seven or eight clocks, measuring timers, used to time the process on the drying tumblers, which were in a bad state of repair, indicating considerable age, this being a very expendable item. However, we figured the cost of entirely new clocks, eight in quantity, of this type, to replace this item, in an amount of $76.00, total for the eight.

Q. If you will turn to 511, 512, 513, 514, 515 and 516. They are all ironing tables and Eclipse steam electric attachments, and I will ask you to state whether or not, as a matter of fact, they are not all gone or destroyed and not in that building at all?

A. We located 511 in the soap room on the fifth floor and figured a total amount of $21.32 to repair and replace this item and relocate. Item 512, 1935 ironing table, Eclipse steam electric attachments, was located stored in the soap room, fifth floor, repairs in the [fol. 769] total amount of $39.22, figuring for the re-

pair and relocation of this item. Item 514, stored first floor, repair costs and relocation figured in the amount of $20.46.

Q. Where did you say 513 was?

A. 513, ironing table, 1935, stored first floor, repair cost, relocation cost in the amount of $38.66 included.

Q. 515?

A. 515, 1935 ironing table with Eclipse steam electric attachment, stored first floor, repair and relocation costs in the amount of $36.22.

Q. Number 516?

A. 516, similar to 515 in description, somewhat different repairs required in the restoration, amount figured at $35.97.

Q. Were those last items I have called your attention to, 511 to 516, some that were at Fort Omaha stored outside of the building for a while?

A. The first two—I beg your pardon?

Q. The first two were?

A. No, I stand corrected. If I understand your question, you asked if those items were stored outside the building at Fort Omaha?

Q. Yes?

[fol. 770] A. They were not stored outside the building. The items were stored inside a heated building at Fort Omaha, the first two items mentioned.

Q. I mean outside the Kimball Laundry Company?

A. Yes, the—

Q. That is true with all those items, 511, 512, 513, 514, 515, and 516?

A. 511 and 512 were stored on the fifth floor, soap room. The remaining items were stored at one time at a warehouse at Fort Omaha, but which have since been brought back to the first floor of the Kimball Laundry.

Q. I will ask you if it isn't true that 532, 533 and 534 of Government's Exhibit 18, are not gone, consisting of six bin container; slat bins, six feet high; slat bins, six feet high; and 32 items, six of them three feet high, if they are not gone, and the same is true, is it not, with

537, a table with shelf, and 541 and 542, that they are gone?

A. Item 532 was located in the buildings. Item 534, slat bins, width six feet, depth three feet, height six feet, ten inches, made principally of two by four lumber, was stored on the fifth floor, repair and replace parts, recondition, relocate, in the amount of $13.44. Item 537, table [fol. 771] with shelf, two feet, eight inches, by eleven feet, was located in the building.

Q. 541 and 542, being large bins, not small items—they are big enough so that you can see them?

A. Item 541, width six feet, eight inches, by depth twenty inches, height six feet, located in the building. I don't know where, $30.00. No restoration was figured.

Q. 542? A. 542, thread cabinet.

Q. Similar size?

A. Width two feet, eight inches; depth one foot, eight inches; height eight feet; located in the building.

Q. Drop to 547 and 548, and I will ask you if it isn't true they are [not] gone, a White sewing machine, non-electric, and a cabinet 18 x 38 x 40—if those two items are not gone?

A. We located this item, figured the cost of cleaning, oiling and adjusting, which costs were figured by the representative of the manufacturer of this dealer of this type of machine, $9.30.

Q. Tell us where they are, those two items?

A. That item, to the best of my recollection, is on the fifth floor. I did not have the exact location noted [fol. 772] on this report at this time. It can be procured, however.

Q. 554 on page 30 of Exhibit 18. I will ask you if it isn't true that the slat shelf rack, five feet, six inches high, fifty inches wide and twenty-four inches deep, is not gone?

A. We located this item in the soap room on the fifth floor and figured relocation cost in the amount of $1.50.

Q. 560, which is a steam air, duster, cleaner and dye attachment? A. We located these items.

Q. Where? A. On the fifth floor.

Q. 564? A. Table, 18" x 56", Maxant Master.

Q. I will ask you if that isn't gone completely?

A. This item located stored on the fifth floor, restoration cost figured in the amount of $19.37.

Q. 571, I will ask you if that lunch counter, steam table and show case is not gone, not even there at all, any part of it; if it wasn't taken out by the government and not replaced for the Kimball Laundry Company, the whole business in the lunch room?

[fol. 773] A. Lunch counter, steam table and show case, is now stored in the soap room of the Kimball Laundry Company, having served its natural usefulness.

Q. Isn't it true the government put one in and installed one of their own and made a concession to somebody to come in and run the luncheon counter?

A. It is true the government moved one in on the fifth floor in the same location in the lunch room on the fifth floor where Item 571 was located, and in regard to the concession, I am not qualified to testify. That information can be obtained.

Q. 574, coffee table. I am asking you if that isn't gone, too, a large coffee table, 30 x 36?

A. This item was found stored in the soap room. No restoration was figured.

Q. Frigidaire, 576, Frigidaire electric refrigerator. I will ask you if that isn't there, but in a useless condition and can not be repaired?

A. That item is stored in the basement of the Kimball Laundry building. The motor is missing. The price of a motor averages around $32.00. Total restoration cost figured in the amount of $46.70, to repair this old refrigerator, domestic type.

Q. Mr. Witness, on the lunch room equipment, that is on the fifth floor, isn't it, all of it?

[fol. 774] A. The lunch room equipment?

Q. Yes?

A. If I understand the question right, you are referring to the recent items just testified to?

Q. Yes? A. Some of it is on the fifth floor.

Q. Where is the lunch room located?

A. The lunch room proper is located on the fifth floor on the south side.

Q. That is on the fifth floor, and that is the one the government fixed up with new steam tables and other equipment they installed, is that right?

A. The government did install new steam tables and some other equipment, such as an electric refrigerator and other items, as required for the serving of lunches.

Q. Are you prepared, as a representative of the petitioner, the Government, in this case, whose property that is alleged to be, as you view it, to state if that is government property or Kimball Laundry Company property?

A. If I understand you correctly, you have reference to the refrigerator and steam table?

Q. Yes, the items you just spoke about in the lunch room?

[fol. 775] A. The items installed by the government, it is my understanding they are government property.

Q. Let's go to 579 on the miscellaneous items on the fifth floor, and you have got something there to check with, and I can give you the balance of these, or we will take them one at a time. There are only a few. Item 579. I will ask you if it isn't true that is gone completely? We are up on the fifth floor now. A. Two pipe rack racks?

Q. Yes?

A. Stored first floor; certain parts thereof stored. You asked me where they were. They are now stored on the first floor. We figured repair costs $11.57 for these two items, very minor items, but worth $15.00 at the time of taking.

Q. 581, six pipe racks?

A. Length seven feet, height six feet, on third floor, relocate.

Q. And 582 and 583?

A. One pipe rack, eight feet long by six feet high, stored on the fifth floor.

Q. 587, Health Mor vacuum cleaner. I will ask you if it isn't true it is not there at all and is gone?

A. This item was found stored in the fur room on the [fol. 776] fifth floor.

Q. 589, an iron stool; 590, two steel bag trucks; 591, nine No. 6 bag trucks; 592, three No. 4 drag baskets—I will leave out 592, the drag baskets—and those three items I have just mentioned, I will ask if it isn't true they are gone from the premises and destroyed, or at least can not be located?

A. Some of those items were located in the building; others were classified as being purchased outright by the government, and No. 4 and No. 6 baskets are classified as having been purchased.

Q. That is correct in connection with items 592 and 593. Those are just baskets, ordinary baskets, but I am talking now about 589, 590 and 591, which are trucks and an iron stool? A. 589, 590 and 591?

Q. Yes? A. We located those items in the building.

Q. Do you know where?

A. Scattered throughout on the different floors.

Q. Will you please tell me again when the equipment was brought back from Fort Omaha?

A. The equipment was brought back from Fort Omaha on February 13 and 14, 1946.

Q. Who attended to the moving of it down?

[fol. 777] A. Who attended?

Q. Yes, who was in charge of it? You, in your department of the government, or some other department?

A. It was moved at the request of my department by other departments of the government.

Q. What other department?

A. Quartermaster department and the laundry department of the Seventh Service Command, and the transportation department of Fort Omaha, I understand, were all involved in the necessary detail procuring these facilities for this transportation job of moving this equipment from the building at Fort Omaha and relocating it on the first and fifth floors of the Kimball Laundry, now known as the Quartermaster Laundry at Omaha.

Q. Was it brought down in army trucks?

A. That I can not answer definitely, not having seen the army trucks. I am under the impression it was army trucks. I can get that information.

Q. Can you give us the number of truck loads?

A. I can at a later time.

Q. Will you procure it and give us the number of truck loads that brought that equipment down from Fort Omaha?

[fol. 778] A. If it is available, yes.

Q. Do you know where it was stored at Fort Omaha, in what type of a building?

A. It was stored in a heated shed building, No. 12, at Fort Omaha, Nebraska, the shed being enclosed in its entirety.

Q. Mr. Witness, calling your attention to Government's Exhibit 21, which apparently makes up a large number of items of personal property, such as equipment of the Kimball Laundry Company, I will ask you to state if each one of the sheets there are not signed by you, C. R. Crowder?

Mr. Murphy: Objected to as not the best evidence, the exhibit speaking for itself.

The Court: What is the purpose of this? You know. You have it before you.

Mr. Hotz: I would like to have the witness answer that in conjunction with each one of these exhibits. The statement was made—at least, I got the impression that these being official records, they might be a bid.

The Court: Is it going to take time to go back over them?

Mr. Hotz: No, he can say whether they were or were not, which ones?

[fol. 779] The Court: He can't until he checks and finds out.

Mr. Hotz: It is on the exhibit.

The Court: I will let you get it.

Mr. Murphy: I suggest, to save time, if any place in Exhibit 21 it shows the signature of C. R. Crowder, that is his signature.

Mr. Hotz: No, that isn't what I want. I know it is his signature. I am not denying his signature. I am not denying they are not on there.

A. If I may answer my question, it was my intent to sign all those sheets, if that is a satisfactory answer.

Q. Then, in connection with Exhibit 11—I am not trying to find out whether there was a sheet or so you did not sign in there. Your intention was to sign them all? A. Yes.

Q. In this Exhibit 11—

A. There are other signatures on these sheets, too.

Q. That is what I want to know? Who are they?

A. A. J. Pargett, and other parties.

Q. Pargett is an engineer out of your office?

A. That is right. He worked under my supervision in the compilation of these factual sheets.

Q. And testified here in the case? A. That is correct.

[fol. 780] Q. Is there anybody outside of the engineers' office who signed that? A. I don't believe so.

Q. It doesn't contain the signature of any person, firm, or corporation on there at all, excepting the engineering corps, members of the engineers corps?

A. That is correct. The actual signature is not on these sheets. I have the estimates and bids for a great number of these repairs obtained from the most reputable sources.

Q. But they are not on that exhibit? A. No, sir.

Q. That would be true with Exhibit 11, save and excepting the signatures of Mr. LaTurner and Mr. Newcom, and their signatures are in their personal names; it is not American Laundry Machinery Company by LaTurner and by Newcom?

Mr. Murphy: Objected to as argumentative and not the best evidence.

The Court: Yes, it speaks for itself. The exhibits are in evidence and disclose how they are signed.

Q. That is right. Exhibit No. 10—

Mr. Hotz: Would the ruling be the same on that be-

[fol. 781] cause the same question would be asked?

The Court: We try to be consistent. It is four o'clock now and to be consistent, we will adjourn at this time until ten o'clock tomorrow morning.

March 14, 1946.

Q. Did you determine the number of loads of machinery and equipment that were brought back to the laundry?

A. No, I have not. I have not had time to do that directly.

Q. Did you have a record of it yourself?

A. No, I can get it from the Quartermaster.

Q. I am asking you if you and your office have a record of it?

A. We don't have a record. It is available on government files, I believe.

Q. The government is a broad thing; very, very broad. Does your office of engineers have it, or do they not have it?

Mr. Murphy: Objected to as having been asked and answered.

The Court: Sustained. You can get it for him if he desires it, can you not?

A. Yes, sir.

Q. When can you do that? A. After recess.

[fol. 782] Q. I am not certain whether you answered this question or not. I rather think you did. My thoughts are not clear on it. Will you bring to the courtroom for our use in this case any written bids that you have, signed bids, having to do with the work outlined in Government's Exhibit 18 or Government's Exhibits 21, 10 and 11, and Exhibit No. 8?

Mr. Murphy: If the court please, I object to that question as improper, the witness not being required to furnish opposing counsel with all of his records. I think if counsel wants those he has a right to ask the witness now while he is on the stand and cover it at one time.

The Court: That will be sustained. The witness is not required, for the fee of $1.50 a day, to spend hours and days searching for papers and that sort of thing. Judge Graven just held that the other day. He has testified and

has gone over on cross-examination the nature of the bids, how they were submitted and what they consist of. You have all of that. He has referred to the fact that these work sheets are in the nature of bids accepted by the government, signed by the parties, and the government, in accepting the preliminary bid, accepts the verbal offer of reputable firms, with a view to ultimately [fol. 783] having them enter into a contract.

Mr. Hotz: It is not a great amount. There are only three or four.

The Court: It doesn't matter how much. Objection sustained.

Q. Have you had a similar matter as the Kimball Laundry Company condemnation proceedings under your jurisdiction in the State of Nebraska?

A. Not in the State of Nebraska, no. I have had similar restoration of government leased laundries in the last six months upon which we have figured the restoration costs and have actually entered into contracts and subcontracts for the performance of work similar to this nature, not being very complicated for a mechanical and electrical engineer for the government personnel of the type of organization of which I am a part.

Q. We handed you an exhibit of items, 178 items, and I think it was marked as an exhibit. They were the items that were removed from the plant by the government, and introduced as our Exhibit 45. Are you familiar with that?

A. Yes; that is, with the nomenclature of the list.

[fol. 784] Q. Could you identify those items on Government's Exhibit 21?

A. For the most part, yes, it can be done. I mean; I can identify them for the most part at this time. There may be a few minor details that would have to be checked. It can be done with the necessary time.

Q. How much time?

A. That, I can not state. It can be done and will be done if so authorized by the court.

Mr. Hotz: I would like to have him, if he will. The exhibit here that the Quartermaster has does not show

any numbers. For example, it shows four, each, shake out racks for flat iron work, and seven ironing boards and stands complete. The so-called nomenclature, as he uses there, and the nomenclature on these exhibits are intelligible all right to the laundry men, perhaps and this witness, but it seems to me that the witness should say, if he can—

The Court: You can't keep the witness on the stand and at the same time expect him to get all this information for you. We are very patient and want to take the time we need.

Mr. Murphy: If the court please, for the record, I am not sure if I understand what the question is, but I believe it is a request of the witness—

[fol. 785] The Court: My understanding is that he wants him to identify these items with their Exhibit 21 in different language than that used in the exhibits.

Mr. Hotz: Well, he could do it simply by making a check on Exhibit 21. He doesn't need to do it on the stand. He can come back and give it in a few minutes.

The Court: Let's go on. He can't do it on the stand.

Q. In connection with Exhibit 45 and Government's Exhibit 21, will you make a check, or some indication of these absent articles; that is, where moved from the laundry by the Quartermaster Corps after the taking?

Mr. Murphy: I would suggest counsel correct that to Government's Exhibit 18.

Mr. Hotz: I will. Wherever I have said "21", it is Government's Exhibit 18, and we have the same itemized list on our Exhibit No. 21.

Mr. Murphy: I object to that as incompetent and immaterial, the witness having already testified to every item on Exhibit 45, which is included in both Government Exhibit 18 and Respondent's Exhibit 21, and it is merely a mechanical process of indicating where each one is in that long list.

The Court: It being conceded that the laundry men [fol. 786] and the government engineers understand the markings and it is of no prejudice to the owners. They understand them. That will be sustained.

Q. In connection with Exhibit 45, I understood it you said 107 items and there are 178 items on that list, Exhibit 45. Can you tell us which ones you consolidated to reduce it to 107 items from 178 items?

Mr. Murphy: Objected to as irrelevant and immaterial, the exhibit disclosing on its face which ones are consolidated, being 107 total items, and when you add the figures at the left, there are 177 or 178 total individual items.

Mr. Hotz: That might be all right, except for the fact that the exhibit says 107.

The Court: Let the witness explain.

A. I can explain that very briefly by the statement that nomenclature—when I spoke of 107 items, I meant separately described items. Your total of 178 items is a grand total, not a total of the different types of nomenclature. It shows 107 items, 107 descriptions ~~of the different~~ typed, classified descriptions. The grand total which you have of 178 has been considered in the government exhibits previously offered and restoration costs [fol. 787] figured, previously testified to.

Q. In other words, the 178 and the 107 are really one and the same thing? A. That is correct.

Q. All right. That is all I want to know.

Redirect Examination of C. R. Crowder by Mr. Murphy:

Q. Some inquiry was made of you yesterday by Mr. Hotz, as I recall, regarding a chimney or smoke stack. I take it that is the same thing, whichever word is used, is it? A. Yes, sir.

Q. Did you examine, since that matter was mentioned, recently, this smoke stack or this Kimball Laundry building? A. I did.

Q. What did you find its condition to be?

A. I found the top twenty courses of the brick work from the top of this masonry chimney to have, well—at least—may I express it this way: The top twenty courses show a result of weathering; that is, the mortar joints between the brick and the top twenty courses show weathering. What I mean by weathering, is the fact that the chimney, being exposed to the elements of rain

[fol. 789] and sunshine, freezing, thawing, going through its expansion and contraction cycles throughout the normal operation and use of this appurtenance, or this chimney; that the water had in down between the mortar joints and in this freezing, it deteriorated the mortar; it has become loosened and the top twenty courses of the chimney have flared out somewhat, although the government has safety engineers and they have not seen fit to order these repairs accomplished, bearing in mind that the government is liable for any damage which would be caused from bricks falling from the top of this chimney, but the condition is not such as, at this time, would be required for immediate repair.

Q. As I understand it, this smoke stack extends up from the top of the building?

A. The smoke stack extends from the top of the fourth floor at the corner, which is the northwest corner of the building, at which point the chimney protrudes from the top of the building from the fourth floor elevation. The chimney extends approximately forty to forty-five feet above the top of the fourth floor.

Q. Having in mind that that chimney has stood there since constructed, back in 1924, do you find anything about that chimney, from your personal examination of [fol. 790] it to indicate to you, from an engineering standpoint, that there was any damage to that chimney or smoke stack other than what you have detailed, resulting from time and the elements? I mean particularly in damage from the use or occupancy of the building by the army?

A. I can see no damage to that item caused directly by the occupancy of the army other than normal depreciation—I would say, normal use.

Q. In doing all of the survey work, engineering work and estimating work and compiling these figures as you have testified on the stand in this case, state whether or not you followed the recognized standard engineering practice?

A. I have, in compiling the factual information that has been rendered in evidence.

Q. I believe you stated yesterday that you had a degree as an electrical engineer. Are you also registered in the State of Colorado, at least, under the laws of Colorado, as a qualified mechanical engineer?

A. Yes, I am registered as a mechanical engineer, having been examined by the board of land surveyors and engineers in the State of Colorado, and granted a registration, which means that I am permitted to practice [fol. 791] professionally in the professional branch of mechanical engineering in the State of Colorado, if I so choose.

Q. Nebraska has no such provision or requirement, as I understand it?

A. That is correct. At the present time Nebraska has no such registration and no such examining board for professional engineers and land surveyors, that is right.

Recross-Examination of C. R. Crowder by Mr. Hotz:

Q. You didn't see the smoke stack in 1942?

A. I did not.

Q. You know, do you not, in July, 1945, that when you were here, that there was a stoppage of all business at the laundry because the boiler down underneath the ground and the boiler itself had all gone to pieces and it had to be stopped? Do you remember that in July of 1945?

Mr. Murphy: Objected to as not proper cross-examination, this witness not having testified to any such incident anywhere in his testimony.

Mr. Hotz: I am leading up to the chimney.

The Court: Yes. Overruled. Was there anything occurred down there at the time he specified that might in [fol. 792] any way affect the chimney?

Mr. Hotz: I want to ask the witness about the incident in connection with the closing down there when they had trouble with the power boiler and equipment.

Q. You remember that, do you not, in July of 1945, or the summer of 1945?

A. Will you state that clearly so I can get the picture? Ask the question intelligibly.

Q. You remember, do you not, that in July, I think it was, of 1945, that the boiler room, the entire boiler and the down drafts and all, started to sink in the ground and that the office of the engineers ordered the plant closed, and you started to dig; that is, the government started to dig down underneath the ground some eight feet, six to eight feet, where seepage of water and steam was coming up in the entire northwestern corner of the building? Do you remember that?

Mr. Murphy: Just a moment. I object to that as improper cross-examination, and an attempt to get into the record some element of damage not testified to by this witness and not mentioned by respondents themselves in any of their testimony. I have no objection to the question if the witness knows anything.

[fol. 793] The Court: On the promise of counsel made to the court that he would connect this up with the chimney, it is permitted. I haven't heard the connection yet, and I don't know whether it will be sufficient, but if it isn't we will strike it.

Q. Do you remember that?

A. The condition you spoke of had no—

Q. Just answer the questions one at a time, if you will please. Do you remember the incident?

A. I remember an incident of a blow off tank having deteriorated in the basement, in the boiler room, but your question has stated that the entire boiler room was undermined, and that is incorrect. The portion that was undermined, that was due to the faulty—due to the deterioration of the blow off tank and was a space about twelve feet under a wall which was some, approximately, I would say, thirty feet from the foundation of the chimney, that portion under the chimney not having been undermined whatsoever, and in my considerate opinion, the incident could have no bearing on the condition of the chimney to which I have just recently testified.

Q. I will ask you if it isn't true, as a matter of fact, that is what caused the crack in the chimney, and if, [fol. 794] as a matter of fact, there are not other cracks

in the chimney which have resulted, other than what you have testified to?

A. There is some checking in the octagonal corner, very mildly, but there is no gas leakage, and bearing in mind the type of construction in this particular type of chimney, being a chimney with eight sides, and a chimney being a piece of masonry which is heated up when you fire the plant up in the morning, and when the plant is cut down at night, the boilers are cut down to a low rate or blanked out altogether, depending on the operating procedure in that particular plant, but, at any rate, the chimney is heated and cooled each day, so, these octagonal corners, being very distinct, naturally they absorb any expansion or contraction in the outer wall of the chimney, and there is a little mortar checkage there, but there is no evidence of any flue gases leaking through from the inner portion of the flue to the outer portion of the chimney, whatsoever, at these points.

Q. Do you know whether or not the chimney has an inner lining to prevent expansion and contraction, such as you have testified to, from the weather; if there isn't an inner lining in the chimney?

[fol. 795] A. I have not been inside the chimney.

Q. But, you would see it if you looked down in it and really wanted to investigate?

A. In order to see the inner lining, it would be necessary to either climb on top of the chimney, which would require the erection of a scaffolding or removing quite solid pieces which are in the boiler room and crawling in the chimney for a visual inspection. The normal inspection procedure would be to go in at the lower portion of a flue of this type, a chimney of this type, and look up. However, if this chimney does have a lining, it will not prevent the expansion and contraction process.

[fol. 796] Cornelius G. Weber, produced and duly sworn as a witness in behalf of the *Government*, testified as follows:

Direct Examination by Mr. Murphy:

Q. Will you give the Reporter your name?

A. Cornelius G. Weber.

Q. Where do you live? A. Milwaukee, Wisconsin.

Q. What is your business or occupation?

A. I am an appraiser and engineer.

Q. Have you had any special school training in engineering or any similar line of work?

A. I was graduated from the University of Wisconsin in 1908, as Bachelor of Science and Electrical Engineering.

Q. Have you followed Engineering and appraising ever since?

A. I first followed engineering work, not so much in connection with appraisals, but rather in consulting work, and as an electrical engineer in various capacities. I might state that in connection with the Milwaukee Electric Railway and Light Company, I had a large amount of experience in construction work. Shortly after, about two years after, the chief engineer of the electrical division went into consulting practice and took [fol. 797] me with him, and I worked for him in consulting work, which consisted primarily of reconstructing plants, making investigations in various lines of industries to search out economies and improvements, and then reconstruction of plants in that manner. I was engaged as electrical engineer for the Janesville Electric Company for a while. Then I went west to Montana, and I was connected there with the Great Falls Power Company, and they shifted me to some work to electrify some coal mines for the Great Northern. I electrified those lines, put in voltage systems, and so forth, and after that I came back and I went with my former employer in the consulting engineering business, where I stayed until 1922. In that connection I made lots of investigations for the Securities Division of the Wisconsin Railway Rate Commission, the floating of stocks and bonds, and continued in rehabilitation of paper mills, rubber plants, breweries, woodworking establishments, tanneries, food processing industries and other industries of various kinds; and then, in the fall of 1922, I became connected with the American Appraisal Company.

Q. What is the American Appraisal Company?

A. American Appraisal Company is a personal service organization. It is the first of its kind. Its business [fol. 798] is devoted to the making of valuations. It is the first of its kind and by far the largest. It has been in existence since—well, fifty years. We are celebrating our fiftieth anniversary this year.

Q. Have you been with that company continuously since 1922? A. That is right.

Q. A period of some twenty-four years now?

A. Yes, going on twenty-four years.

Q. Is that company engaged in the business of surveying and appraising industries, industrial plants all over the nation and of all types?

A. That is right, and it has even gone beyond the national work. We have made many appraisals in South America and in Europe.

Q. Have you made appraisals yourself all over the United States for the company?

A. I have made appraisals in all but six states of the United States.

Q. Have you in recent years made numerous appraisals of laundry building equipment machinery, dry cleaning equipment and things of that sort?

A. I, personally, have made four or five in the last several years, and as far as the company is concerned, [fol. 799] I have a list of over 430 laundries that have been appraised. It is a partial list over a period of years.

Q. And some of those in which you did not personally take part in the actual work, I suppose you have had occasion to check the record, or be familiar with the things that were done? A. I have.

Q. Did your firm, American Appraisal Company, at our request, make an appraisal of the Quartemaster Laundry, formerly the Kimball Laundry property here in Omaha? A. I did.

Q. When did you make that appraisal?

A. In August, 1944.

Q. Were you alone, or did you have assistants?

A. I had three assistants.

Q. Who were they?

A. Mr. William Cloud, Mr. Victor Hackbart, and Mr. David Montanna, who appraised the land.

Q. The last mentioned gentleman was engaged in the land? A. Yes.

Q. Are the other two gentlemen who you mentioned, Mr. Cloud and Mr. Hackbart, here in the courtroom?

[fol. 800] A. They are.

Q. How long did you men spend in the making of this appraisal, I mean, first of all, the physical work?

A. We spent collectively fifty-one and three-quarters days, and in addition to that, one hundred seventy-two hours, translated to eight-hour days, would be twenty-one and one-half days of computations and compilations, getting the work together, so with that included, it would be about seventy-three days.

Q. Were you in charge of this appraisal? A. I was.

Q. And these other gentlemen worked under your direction with you? A. That is right.

Q. In making that appraisal, did you personally go though this entire plant? A. I did.

Q. Did you personally observe everything that was in that plant?

A. I personally observed everything that was in that plant, but not with the minute detail that was followed up after we had gone through and on which I relied on my assistants for further detail.

Q. Are they experts in their particular work?

A. They are.

[fol. 801] Q. And have been engaged in it for several years? A. That is right.

Q. And they are also American Appraisal men?

A. That is right.

Q. And they were working under your immediate direction and supervision? A. That is right.

Q. You necessarily relied on them for some of the more minute details? A. That is right.

Q. But you personally observed the thing and were there in the plant for several days and saw everything

that was there? A. Yes.

Q. What did you have available there in the way of records of dates of purchases and installation costs and things of that sort?

A. We had available a certain apprasal that was made by Mr. Lewis Sholes, and as I understand it, as of November 21, or November 22, 1942, to serve as a guide as to what property was there at that time. We also had a plan; that is, a set of prints that Mr. Sholes had furnished, which showed the location of every machine that was in place in November, 1942, and also the name and description of that machine, so, whether the machine was [fol. 802] there or was not there in August, 1944, we had the record of the machine that was there and the description of the machine that was there. There was also a certain Mr. Harry Thompson, who used to be the Master Mechanic for Kimball and he was in the employ of the Government at that time in the laundry, who went over all of these machines with Mr. Cloud after he got into the detailed examination, reinspected the machine and discussed and described what change in condition there had been, if any, that we brought out through this discussion with Mr. Thompson. Now, it is the usual practice—

Q. Let me interrupt you just a minute. Do you also have the cost figures of these items?

A. Do you mean the cost figures in Mr. Sholes' appraisal, or our own cost figures?

Q. Any cost figures?

A. The cost figures we established are the cost as of that time, irrespective of what they cost originally. Our appraisal is based on the cost of the equipment at the particular date; whether it cost more or less at the time it was installed is not the basis of our appraisal. Our appraisal is based on what it would cost to replace the [fol. 803] machine in the given place at the given time at the prices as of that time.

Q. That is what I am getting at. Did you, as a part of your work in this appraisal, determine the cost new of each machine in this entire list? A. We did.

Q. As of the date of your appraisal?

A. That is right.

Q. So, you will have that as to each machine down there? A. That is right.

Q. Did you figure the cost of reproduction as of the date of the survey of the building itself?

A. That is right.

Q. And of the power plant and everything involved down there? A. That is right.

Q. Did you do that by making proper inquiry of contractors and of machinery manufacturers who manufacture this machinery, and things of that sort?

A. We have a very extensive, what we call, price analysis, a price department, in which we keep up a file of prices going back fifty years of price changes of all important machinery and equipment, building construction materials in different cities, labor rates in different [fol. 804] cities. We have voluminous correspondence, a large amount of correspondence on big items of machinery where you can not look into a catalog and find a price or find the discount. Say for example, a boiler, or a steam turbine, or an engine, we make an appraisal of a certain property at a certain time and we encounter such a piece of equipment—we then correspond directly with the maker of that piece of equipment, stating that we are making a valuation and want a quotation on that piece of machinery, either on board cars at the plant, or on board cars at the point of erection, or whatever the conditions are, and in that way we obtain the price of equipment of that kind.

Q. I think it won't be necessary to go into so much detail. Did you do that generally on this particular job?

A. Yes, we got local labor rates of all the building trades, and the prices of cement, gravel, stone, and whatever goes into that at that time.

Q. With all of these figures, and your own check and survey, and seeing the plant—I suppose you saw it in operation? A. Yes.

Q. Several days there? A. Yes, sir.

[fol. 805] Q. And saw all the machinery that was there in the building and the power plant in actual operation under Government operation? A. That is right.

Q. And with all of that information, and all of your work, can you, and did you arrive at a valuation as of November, 1942? A. I did.

Q. Is that a regular and recognized appraisal engineering procedure? A. That is right.

Q. Have you done that in many other cases?

A. I have.

Q. Have you testfiied in State and Federal courts on numerous occasions?

A. I have testified in Federal Court. I have testified before the Interstate Commerce Commission. I have testified in various Tax Courts, Municipal Courts, and so forth.

Q. Sometimes for the Government and sometimes against the Government; sometimes in cases in which the Government was not interested? A. That is right.

Q. And has your testimony been accepted in all those courts and on those occasions?

[fol. 806] With one exception.

Q. One out of a great number? A. Which I could explain.

Q. I don't think that is necessary. Was it a condemnation case?

A. It was a condemnation case in a small community and the qualifications were that I must have bought and sold gravel pits in that county and anything outside of that county wouldn't count, and they disqualified me.

Q. But outside of that, your testimony has been accepted in many courts on these appraisals?

A. Yes, sir. I was never disqualified before.

Q. And generally, again, did you do the work here with your men, and entire routine, in the same manner as in these many other cases in which you have testified?

A. That is right.

Q. And arrived at your conclusions as to valuations and as to rental or use values?

A. That is right.

Q. First, I will hand you Exhibit 19, which has been referred to as the Sholes report, or inventory, not yet in evidence, and I will correctly identify it in due time, and ask you whether that is one of the lists or items that [fol. 807] you had consulted in your work in making that appraisal? A. That looks like the same thing.

Q. And taking my word, for the moment, that that is Mr. Sholes' inventory? A. Yes.

A. And that contains, does it, the photographic copies of the map showing the layout of the machinery on the different floors that you testified to a bit ago?

A. Yes.

Q. As a result of your survey, investigation and work which you have detailed, did you arrive at a fair and reasonable value of the entire physical plant; that is, the land, building and power plant and equipment involved here, as of November 22, 1942? A. I have.

Q. What in your opinion was that fair and reasonable value of that entire plant as of that date?

Mr. Hotz: Just a minute. I think you testified you were not here in 1942 and did not see the plant until 1944.

The Court: Just a moment. You have not permission to cross-examine.

Mr. Hotz: I beg your pardon.

The Court: You must ask permission if there is any [fol. 808] reason you should cross-examine in order to prepare your objection, if any.

Mr. Hotz: May I ask the witness a question or two, because I don't know?

The Court: Very well.

Cross-Examination of Cornelius G. Weber by Mr. Hotz:

Q. You have a paper in your hand, do you not?

A. I have.

Q. That is not the Government's Exhibit 19, is it?
A. No.

Mr. Hotz: Then we object to the question upon the grounds that the witness has not shown himself qualified, not having seen the property in 1942.

The Court: Overruled.

Direct Examination of Cornelius G. Weber by Mr. Murphy (Continued):

Q. Answer, Mr. Weber, the amount of your opinion as to the total fair valuation in November, 1942?

A. $455,000.00.

Q. Did you arrive at that in the manner you have outlined in your testimony? A. That is right.

Q. Did you then also determine and arrive at the fair annual rental or use value of that same physical property? A. I have.

[fol. 809] Q. What in your opinion was the reasonable, fair, annual use or rental value of the property we have described—first, give me your total annual rental and we will break it down later?

Mr. Hotz: Objected to as the witness not having shown himself qualified to answer; incompetent; not showing that he has had any experience whatever in rentals, and especially of property of this sort and of laundries; not showing that there ever has been a laundry rented at all to anybody, excepting on a temporary use in a condemnation proceedings, perhaps.

The Court: Overruled.

Q. Will you give me the total annual rental and then we will go into detail?

A. The total over the period, or the total per year?

Q. Per year?

A. May I ask a question in that connection?

The Court: Certainly.

Mr. Murphy: If my question is not clear, certainly.

A. I have an annual rental worked out that I made in 1944, to which I have made some adjustment at the end, which would make the average annual a little higher

than the figure I had in 1944. If I give the basic figure that I have per year and multiply that by three and six-tenths I get a figure to which I have made an adjustment. [fol. 810] Q. We will come to that adjustment. While you are on that, do I understand you have been in Omaha for the past nearly two weeks and heard all this testimony? You have been down at the plant and have reconsidered and re-examined all of your figures and made some little final adjustments? A. I have.

Q. Give me them so we will have the main figures together, the annual rental figure?

A. $70,000.00 a year.

Q. Let's break that down. Tell me what elements you used and the amounts of them in arriving at that figure? First of all, let me ask you, did you consider a return on the investment? A. That is right.

Mr. Hotz: Object to that as leading. Wouldn't it be better to ask the witness?

The Court: It is leading, but the main question was, what are the elements he took into consideration. The other was sort of an after-statement. Answer the main question, what were the elements you took into consideration?

A. I took into consideration a fair return on the total amount of value of six per cent. Six per cent on $455,- [fol. 811] 000.00 is $27,300.00 a year. Then I made an estimate of what amount should fairly represent the property taxes and insurance as based on the amount of property there—that is in the absence, or not having the books there and having the detailed figures of what the company actually paid for taxes and insurance on the property, and I estimated it $9,000.00.

Mr. Hotz: Per year?

A. Per year. Then, on the basis of the condition of the building, location, and so forth, I considered that that building could be used for at least thirty years more as a laundry. Now, as far as the building itself is concerned, before it would wear out, that might be much longer, as we all know there are buildings that are sixty,

seventy, eighty and one-hundred years old, but to allow for those things that might take place, such as it might be more economical to move the laundry out further, or to have a one-story laundry, or whatever changes take place in style and things getting out of date, or the way the city expands, it looked as though one probably should cut that period down beyond what the building would require to wear out, so that would mean that we would [fol. 812] write off as depreciation three and one-third per cent a year on the building. However, while I was there, there was considerable discussion of the way the building wasn't being cared for as well as it had before and that certain machines were overloaded and vibrated a little more, and things weren't going to be kept up quite as well as they had been. I increased that by 35% to allow something for abnormal depreciation on the building, so I used 4½% on my valuation of the building. Then on the machinery—now, a machine loses its value through various factors. One of them is wear and tear. For instance, a boiler usually wears out over a period of years, primarily because of time and usage. Of course, boilers also get out of date, as most boilers of fifteen or twenty years of age are largely out of date, but other kinds of machines, or many other kinds of machines, if left entirely alone without repairs, would wear out very quickly; whereas, some of them can be kept going twenty, thirty, forty and fifty years. I know engines that are fifty and sixty years old, and they are out of date, of course, but they still operate, so that one wouldn't figure that machinery, in spite of the fact that it is good and can be kept up and rebuilt and carried on indefinitely. [fol. 813] I figured that on an average I would allow about 5½% depreciation on the value of the machinery per year. However, there is also the matter of longer hours of operation and using everything more or less fully in the plant, so I increased that 35% and used 7½%. These estimates were made in 1944, not now, all of this part here. I also considered that in a normal lease be-

tween business people there would be some way in which one or the other could cancel the lease in case there was abuse and the lease wasn't being lived up to, or something, but in a case of this kind there is no such clause—the owner has no option to cancel the lease. At the time I was there I had seen boiler inspector's reports that indicated to me that the boiler had suffered some unusual damage. However, the owner had no option but to go on and I said, "Well, if this kind of thing continues, he should have some protection. It is impossible to know exactly what will happen in the future, but I think there should be $6,000.00 additional set aside for such a reason." It is kind of a contingency, too; it is kind of an extra factor of protection, so if you take the fair return of $27,300.00, and $9,000.00, taxes and insurance, and a [fol. 814] depreciation of $27,771.79, and total those up—

The Court: What are those figures?

A. $27,771.79, and when those are added together—

The Court: Does that include the $6,000.00?

A. It does not, Your Honor; that makes $64,071.79. I then rounded that figure to an even $64,000.00. That is the figure indicating a round sum amount, because you wouldn't be apt to figure a lease down to a penny, and then to this $64,000.00 I added this $6,000.00, and I obtained $70,000.00 as the fair annual rental.

Q. Going back to your depreciation, for a moment, tell us as to the building itself, how much you allowed per year for normal depreciation, just the figure of the depreciation allowance.

A. The depreciation allowance on the building was $7,463.90, of which I considered $1,935.23, additional or above normal.

Q. And as to the machinery—start with the first normal figure and then the excess figure and then the total?

A. Then I had a normal figure for machinery of $14,892.45, and an additional amount, excess depreciation of $5,415.44, but that wouldn't be all that I have allowed for the abnormal because that $6,000.00 would apply to

[fol. 815] the abnormal conditions, and when that is added to these other two items, as provided in round numbers, $13,350.00 a year for abnormal operations and abuse, you might say.

Q. What was that last figure? A. $13,350.00 a year.

Q. Is that per year and over and above and in addition to normal depreciation, return on investment, taxes and insurance? A. That is right.

Q. Is the purpose of that to cover the additional and excess use of the premises as claimed and as you observed when you were there at that time?

A. That is right.

Q. Did you then compute the total of the annual rental, including all of the items you have listed; that is, return on investment, taxes and insurance, normal depreciation, the excess depreciation, and the $6,000.00 per year, making a total of $70,000.00 per year rental? Did you compute that into a total lump sum for the period covered here; that is, November 22, 1942, to June 30, 1946, both inclusive, or a period of three and six-tenths years?

A. I have computed that now, yes, sir.

Q. And what is that total figure?

[fol. 816] A. Three and six-tenths times $70,000.00 equals $252,000.00.

Q. Did you, in your re-study and re-examination, and having the benefit of all of the testimony in this case, make still some further adjustment in your figure?

A. I have made an adjustment.

Q. Will you tell us what that is, please?

A. When I took the amount of $13,350.00, which represents excess depreciation and abuse, as estimated by me in 1944, and now multiply that by three and six-tenths years, I get a round sum figure of $48,000.00, which would mean that on the basis of $70,000.00 a year, $252,000.00, as if paid up to now, there would be a fund there, an amount of $48,000.00 set aside; or if they chose not to use it for reconstruction, $48,000.00 in addition to a fair return on the investment and amount to pay taxes and insurance, and an amount to provide for the normal depreciation of wear and tear on the plant. Now, I have

heard in the testimony here from Mr. Jacobberger that the taxes and insurance were somewhat under $7,000.00, which would mean that I had overestimated the taxes and insurance per year by about $2,000.00. I have heard [fol. 817] the testimony regarding the costs of reconstruction, bids on painting, and so forth; and I have spent time going over the property again, re-examining machines, assuming that gears would have to be replaced in many instances, whether you could see definitely the necessity for them or not; matched painting costs against total property values; and made other general broad checks, not detailed checks that I could explain machine by machine and every square foot of space, but the estimates that I followed and the way they were gotten up looked very reasonable to me from an engineering and appraisal standpoint, and while I had $48,000.00, which was set up at a time—the annual rental was set up at a time when you couldn't know what the final result would be until the property was turned back, I considered that I should adjust that $48,000.00 by about 25% increase, and use $60,000.00 in place of the $48,000.00 that I had developed, so I concluded that my original estimate was $12,000.00 too low on account of the repairs and reconstruction, considering the extent of the reconstruction, and $2000.00 a year, or for three and six-tenths years, $7200.00 too high on account of overestimating taxes and insurance, so the net result is that I would add $12,000.00, [fol. 818] minus $7200.00, or $4800.00 to my $252,000.00, which would give $256,800.00, or in round numbers, $257,000.00 as total damage for three and six-tenths years.

Q. Let me ask you whether or not your final figure, $257,000.00, something a little over a quarter of a million dollars, in your opinion, covers the full amount of return on investment, insurance, taxes, depreciation, both normal and excessive, and any and all elements entering into a matter of this kind, and covers in full, in your opinion, the total amount in this case?

A. It does, and I would like to make a little further explanation on that, if I may. At the time I made the $70,000.00 estimate, that was based on the idea that the

Government would put back in place all of the machines, any and all machines they had taken out. This revised figure, which is based on adjusting my $48,000.00 up to $60,000.00, includes the provision of bringing those machines back, on the basis of inclusion, and these other estimates which I have heard the testimony, so that it is all inclusive.

Q. Do I understand that in your final total sum of $257,000.00, you have included as a part of it, $60,000.00 restoration and repair costs of the building, power plant [fol. 819] and machinery? A. That is right.

Q. That is already included in the $257,000.00 and should not be added to that? A. That is right.

Q. Did you compile, or have compiled under your immediate direction, a brief summary setting out the items and figures to which you have testified? A. I have.

Q. I will hand you Exhibit 22 and ask you if that is the summary you had prepared? A. That is right.

Q. Does Exhibit 22 reflect correctly the items and amounts to which you have testified? A. It does.

Mr. Murphy: Government at this time offers in evidence Exhibit 22.

Mr. Hotz: Object to it as incompetent, irrelevant, and immaterial; not the proper method in arriving at just compensation in a condemnation suit.

The Court: Overruled.

(Government's Exhibit 22, found in Vol. IV at page 1120.)

[fol. 1120] ESTIMATED FAIR RENTAL

Return on Fair Market Value of Property at 6% of $455,000	$ 27,300.00
Estimated allowance for Property Taxes and Insurance	9,000.00
Depreciation—	
Buildings—Normal Yearly Rate on Building on Basis of 30 years of Remaining Economic Life at 3 1/3% of $165,860.02	$ 5,528.67

Estimated Additional Depreciation for Abnormal Operation at 35% in excess of 31/3% or 1 1/6% additional on $165,860.02	1,935.23	
Total Building Depreciation per Year	$ 7,463.90	
Machinery and Equipment—		
Normal Yearly Average Rate Estimated at 5.5% on $270,771.75	$14,892.45	
Estimated Additional Depreciation for Abnormal Operation at 33% in excess of 5.5% or, say 2% Additional on $270,771.75	5,415.44	
Total Machinery Depreciation per Year	$20,307.89	
Total of Building and Machinery and Equipment Depreciation		$27,771.79
Total of 6% Yearly Return, Taxes and Insurance and Depreciation		$64,071.79
In Round Numbers		$64,000.00
Additional Allowance for Contingencies and Uncertainties regarding expiration of the lease		$ 6,000.00
Grand Total Estimated Fair Rental Per Year		$70,000.00

The period from November 22, 1942, to June 30, 1946, inclusive represents 3 years, 7 months, and 9 days or about 3.6 years.

Total Rental for 3.6 years at $70,000.00 a year	$252,000.00

Adjustment for expense of relocating machinery in original positions and miscellaneous extra

items, less overestimate of taxes and insurance	4,800.00
Grand Total	$256,800.00
In Round Numbers	$257,000.00

Cross-Examination of Cornelius G. Weber by Mr. Hotz:

[fol. 820] Q. Have you made a large number of appraisals for the United States Government during the past number of years since the war started?

A. I have made four in addition to this here, in the last several years, that I can recall. I would have to refer to my list to see as to others.

Q. I mean not only laundries, but other installations, Government operations?

A. Not so many for the Government, no, but many other appraisals, not all for the Government.

Q. When you completed your report in August of 1944, or made the report from examination in 1944, you did it for the United States Government?

A. That is right.

Q. Did you make a preliminary report to the Government as to the replacement value of the property down there as you saw it in 1944, in the first report you made to the Government? A. No preliminary report.

Q. Did you make a report to the Government that showed another figure other than $455,000.00?

A. Yes, I reported $450,000.00. I have made the change on the land for one reason only. The man who did the detail on the land is not here. We had a lower figure than Mr. Sholes and I have put in Sholes' land [fol. 821] values in our report.

Q. Mr. Sholes was a Government employee, was he not?

A. I would assume at the time he was employed by the Government, if he made an appraisal for the Government, but whether permanently employed, I don't know.

Q. You started out, did you not, with valuations that were given to you by him, by Mr. Sholes?

A. Not with the valuation. We were guided by the items only, the physical items, not by his figures, but as I see the land now.

Q. Were you given a list of costs? Did you concern yourself with original costs of either the machinery, equipment or building?

A. Not any cost that he put on. We were not concerned with that at all, because we used our own cost as of the date of the appraisal for establishing the basic costs, new figures. His figures wouldn't be a guide at all.

Q. Did I understand you to mean that all of the machinery and equipment that you saw in the plant in 1944, when you made the appraisal, contained the original cost as of that time to start with? Did you know the original cost at that time?

A. We weren't working with original costs. We were [fol. 822] working with costs new as of that date, irrespective of what the original costs were.

Q. What was it in reference to the machinery and equipment?

A. The cost new of that machinery at that time was the basis for first working out the reproduction cost of the property new as of November 21, 1942, which I understand should be November 22, 1942, but that wouldn't make any material difference; and then from those costs new we arrived at the depreciated values, which, when they are all summed up, come up to the figure I gave as the total value.

Q. Do you have a separate figure for the machinery and equipment?

A. I have separate figures for machinery and equipment and building, and so forth.

Q. Could you give those to us? We would like to have a copy, if we could.

The Court: They are not offering the copy. You can have it, of course, if they propose to offer the statement. You are asking for his figure. He can read the figures, or you can ask him if he has a compilation of his figures correcting his valuations.

A. Just machinery you want now?

Q. Yes, and tell us before you give the number just [fol. 823] what you include by machinery and equipment. Let us not mix it up with the power equipment.

A. Under the general term, machinery, I have included here, boiler plant, production machinery and equipment, which means the machines and equipment used in the laundry operations themselves, directly in laundry operations, water heaters, tanks, plant trucks, scales, plant furniture and fixtures and office equipment, and the fair market value of those items, $251,696.62.

Q. Now, the power equipment?

A. I indicated that the boiler plant is in there.

Q. Then, you did not consider anything separate in that regard? Have you any details in connection with that? A. Oh, yes, I have details.

Q. I would like to see the power equipment separately, if you have it?

A. I will have to refer to my notes on that. The boiler plant, which consists of boilers, stokers, controls, forced draft unit, steam flow meter unit, ash elevator, ventilating fans, blow-off well, condensate receivers and boiler-feed pumps, and the wiring connections between motors and starting switches that pertain to motors operating [fol. 824] in the boiler room, and exclusive of the piping, which is in the piping account, the depreciated, or fair value—understand, this boiler plant is quite old—is $12,151.45.

Q. Did you make any estimate as to its cost in 1944, its cost as of 1944? A. As of 1942?

Q. Did you make an estimate of its cost in 1942?

A. Certainly, would have to, yes.

Q. What was that?

A. You mean the cost new, or its depreciated value?

Q. New? A. If it were new at that time?

Q. Yes? A. That would be $26,116.00.

Q. In connection, then, with the machinery and the laundry machinery and equipment, what was your estimate of its cost in 1942, as you arrived at it, the sum total, and then we can subtract these two figures, because you included them together, isn't that right?

A. The production machinery, which consists of markers, washers, controls, extractors, no-trux system, drying tumblers, drying cabinet, flat work ironers, shirt finishing [fol. 825] systems, conveyors, pressers, hand iron units, sewing machines, dry cleaning machinery, garment pressers, hat cleaning and blocking equipment, pillow renovating equipment, curtain and blanket cleaning and drying equipment, fur renovating and repairing equipment, refrigeration equipment, ventilating fans, compressed air machinery, circulating pump, other major mechanical production units, including wiring connections between motors and starting switches or control panels, but not piping, which is a separate classification, I have a fair value of $192,072.00.

Q. Give us the cost figure?

A. The reproduction cost as of November 21, 1942, or for that matter, November 22, would be $276,812.00, if it were all new at that time.

Q. I don't want to, Mr. Witness, appear to be totally lacking in mathematics, but what I do want to know is whether or not that $276,812.00 includes the $26,116.00 that you gave in connection with the boiler, or is that separate?

A. Let me explain again. When I gave the figure of machinery, I said, comprising boilers, and so forth, and named these other items. Now, you asked separately for the boiler plant and I gave that.

Q. That is right.

[fol. 826] A. And then I gave you separately what I call strictly production machinery, but that is not yet all of our machinery account. There is still more machinery. That was production machinery, boiler plant and production machinery, is what I have given you so far.

Q. Give us the rest now, please?

A. Then I have water heaters, consisting of Kelly reclaimer heat exchanger with concrete tank and recording thermometer and storage heater. I have for that a fair value of $4524.50, and a reproduction of $7680.00. Then I have another item, water storage tank, consisting of cold and hot water tank, a fair value of $3832.10, and a

cost or reproduction of $4678.00. Then I have another item under machinery, water softener equipment, consisting of one battery of three Refinite water softeners, brine making tank, brine pumps and salt reclaimer tank, a fair value of $13,488.55, and a cost new of $18,059.00. Then I have the plant furniture and fixtures, which consist of trucks, scales, fire protection equipment and minor equipment, time recorders, auto call systems, intercommunicating system, night bell signal, water cooler, fans, a fair value of $16,387.16, and a cost of reproduction of $25,502.65; and then a final item under the general heading of machinery, of office furniture and fixtures and office [fol. 827] mechanical equipment, and the rest room, also, a fair value of $9240.86, cost of reproduction of $13,521.15, which makes a total for machinery of $251,696.62, as the fair value, and $372,368.80, as the cost of reproduction. That total means machinery as it appears under a major heading of machinery and equipment. Now, in addition to that machinery, I have four other items, one of which is called power feed wiring, and that means all wiring and appurtenances up to the starter of the electrical motors, because the wiring between starters and motors is listed with the motor and with the machine to which it pertains. That power feed wiring, the fair value of $6440.09, and cost of reproduction of $9200.13. Then there is a refrigeration plant—it is a small unit—fair value $1594.50, cost of reproduction $2126.00. Then we have an item of piping, which means the piping used throughout the plant for processes, as distinguished from heating piping and plumbing piping, which are included with the heating systems and the plumbing, which, in turn, are included with the buildings, so, manufacturing piping, the fair value, $10,859.31, and cost of reproduction of $17,790.41. Then we have American District Tele- [fol. 828] graph Company conduit and telephone conduit, which are merely the leads carrying these circuits. It is almost a minor item under general classification, but it happens to be something in which there is a dual ownership, so it is set out separately, fair value $181.23, cost of reproduction $258.90, making a total for machin-

ery and equipment of a fair value of $270,771.75, and a cost of reproduction of $401,744.24.

Q. In your examination, did you have an occasion to check it, or have the use of the Lloyd Thomas & Company appraisal?

A. We tried to obtain it, but we were not given permission to use it.

Q. Who are the Lloyd Thomas Company?

A. An appraisal company in Chicago, and either one or both of the senior partners, at one time, were with the American Appraisal Company.

Q. And they have offices all over the United States; that is, many of the principal cities of the United States?

A. They have offices in other cities, I believe.

Q. When you came out here to make your appraisal, whatever books and records the Kimball Laundry Company had were gratefully given to you and aid and assistance was given by the Kimball Laundry Company for [fol. 829] whatever you asked for or wanted?

A. I wouldn't say that, no. I obtained some figures from you over the telephone, but I had no operating records from the Kimball Laundry Company. I would like to have seen something in that regard, but—

Q. Weren't they furnished to you by the Government?

A. Well, the only figures that I had from the Government were given to me as figures—they said, here is a transcript of record. I have a record of what that transcript was, and I made an examination of that transcript insofar as it might have some bearing on the facts, but when I was all through I made no use of anything in these figures I am giving today.

Q. The land values you got from what source?

A. We made an exhaustive study of sales, holding prices, and so forth, as of about that time, or a little before and a little after, around the neighborhood, and as stated before, Mr. Montanna did the detail on that work, and if Mr. Montanna were here he would testify to those details, over which I went myself.

Q. Mr. Sholes was a real estate man, too?

A. Yes, and for that reason, since coming back, I

have taken Mr. Sholes' higher appraisal in favor of our lower appraisal.

Q. And that was what? A. $17,600.00, is the figure.

Q. Was there any change in that figure from 1942 to 1944?

A. No, I appraised it as of 1942, not as of 1944. The appraisal is as of—all of these appraisal figures that I will speak of, unless I qualify it otherwise, means November 21, 1942, which was the date given to us, and I would say that for all practical purposes, November 22, 1942, as there would be no reason to change them for that difference of one day there.

Q. Now, the building itself?

A. The building itself has been subdivided into construction and certain other accounts, and the total, which includes as I said, construction, plumbing, sewerage, heating system, electric lighting system, sprinkler system, building elevator, fair and reasonable value $165,860.02, cost of reproduction $223,580.96.

Q. If you will pardon me, I would like to have the hundreds part of the $165,000.00 figure—$165,—

A. —$860.02.

Q. You say that was the value of the building in 1942? [fol. 831] A. That is right. May I ask a question? In some of these discussions that I have heard here in the courtroom, boiler plant is thrown in with the building, and sometimes is as real estate, and I have taken that with machinery, so that I want you to understand it does not include the boiler plant, so that when you match up figures you don't get confused.

Mr. Hotz: That is fine. We like to know that. In connection with the taxes, we will get that straight. We will have the county treasurer come over and tell us what the taxes are, I have asked him to come.

The Court: Can he not just send over a statement and we will accept the statement, no doubt, if he signs it.

Mr. Murphy: Certainly. Any official tax statement will be all right with us.

The Court: Let us save what time we can about matters not in controversy.

Q. I want to try and match up as nearly as I can, some of our own figures with yours, and I will state for your information that replacement value of this property in November, 1942, as we had it, was $647,107.47. Ours was made up of $30,000.00 for land; $280,348.00, building; laundry and dry cleaning equipment $273,831.39; and [fol. 832] power equipment $62,928.08, our total $647,107.47. As I got it from your answers that you gave to our questions on cross-examination, that same total for yours is $642,934.39, is that right? A. I have $642,925.20.

Q. What I want to know is this: Is this valuation that you placed what is called replacement value of $642,925.20, brand new, or is it what it would cost to replace the property in its then condition?

Mr. Murphy: Objected to as improper cross-examination; incompetent and immaterial; and not correctly reflecting the testimony in the use of the phrase "replacement value." The phrase used by the witness was reproduction cost and not value.

Mr. Hotz: Couldn't the witness straighten that out, Your Honor?

The Court: Yes.

A. It means that if that property had been built as of November, 1942, under the prevailing labor rates, prices of materials and so forth, under normal conditions, not the war stress when you couldn't get labor and there would be delay and interruption and so forth, but under a reasonably normal condition, and replaced that property with [fol. 833] new equipment, not new modern equipment, but the identical kinds of equipment new—for instance, here is a washer of an old style, or that old panel board, which is more or less obsolete as measured by the modern machines, but you had bought one of those instead of the newer type machines, and put the same kind of boilers in there, and different kinds of things, brand new, but without any modification from what that property was, that that is what it would have cost had it been new.

Q. In order to arrive at your figure of $450,000.00, approximately $454,231.77, with some modifications, you then took a depreciation, an arbitrary depreciation, based

upon your experience, an arbitrary depreciation, and you depreciated that property from the $642,925.20, which is approximately the same as our figures, $642,925.20, and the $454,703.51 is the depreciation on that machinery and building that brought it down to the figure of approximately $455,000.00?

A. I would say that the depreciation is something more than just arbitrary but depreciation has never been and can never be an exact mathematical science. It is based in part on that and it is based in part on judgment, by the usual accepted practices in appraisal work in so far as a trained engineer and appraiser can judge [fol. 834] those factors.

Q. So that, as a matter of common practice, as well as a matter of common experience with all of us, it depends on the use that is given to a given piece of machinery or equipment, as to whether that rate of depreciation—that is, the actual figure would depend on the amounts of replacements that had been put on the machinery, the care with which it had been used, in order to determine its real value at a given time?

A. That is part of the story. Another part of the story is that a plant with machinery and equipment, and a building itself, which would not be replaced in like kind; in fact, if you were building it, you would have a more modern plant—so that depreciation recognizes, in addition to wear and tear, what they call functional depreciation or obsolescence. For example, if there is more efficient boilers to be had at prices commensurate, prices in proportion to the better efficiency, why that boiler, if it were new and you would put that in place exactly in like kind wouldn't really be worth what it cost, any more than if you could buy an automobile that was built ten years ago but had never been used, and put on new tires and the machine at that time cost $1500.00, and a similar [fol. 835] machine would cost $1500.00 today, you would have to mark that machine down because it would not be modern. Even though it were new and without any wear and tear, there would be a certain amount of old-fashionedness, or they call it obsolescence, right in the new ma-

chine, so that when I figure that if you had replaced it just exactly item for item with what there is there, and if that shows $642,925.20, and if it were repaired in perfect condition, not a bit of wear anywhere, as it were, you couldn't call that the value, because immediately I would have to apply this part of depreciation as obsolescence, as being old-fashioned, and the building, as well as the equipment—not all equipment, not part of the building, but as measured by modern standards and the way it possibly would be modified—not that we know just how this plant would be built—it is a matter of opinion of the designers and the owners—but I am sure it would not be replaced exactly as it is if it burned down completely.

Q. Isn't it true that that building, as it stood in 1942, was not actually worth to the Kimball Laundry Company, or to anybody who wanted to use it for the purpose for which the Kimball Laundry was using it, would not have [fol. 836] been worth $283,348.00?

A. My appraisal shows $223,580.00, and I don't think it would have been worth that, so therefore, I wouldn't have it worth $280,000.00.

Q. I will ask you if the laundry and dry cleaning equipment throughout that laundry, as it stood in 1942, November, 1942, did not actually have a fair value, market value, at that time, for the use for which it was being used, and for which it was desired for further use, was not $273,831.39?

A. I have a figure here. I don't know if you are reading my figure.

Q. That is the figure I read you was our figure.

A. That was the depreciated value or cost of reproduction?

Q. That was the value of that machinery and equipment as it stood in November, 1942?

Mr. Murphy: I object to the statement of counsel and move the Court to strike it and instruct the jury to disregard it. That may have been some testimony, but his statement is a conclusion, whether that was the value or not.

The Court: Strike the question and ask another question. Keep it within the record, Mr. Flotz.

Q. Isn't it correct and true, Mr. Witness, that the [fol. 837] value installed in its location in that building on November, 1942, of the laundry machinery and equipment, including the supply room, panel room, delivery room, and offices, and the machinery throughout the building for laundry and dry cleaning, was not, as a matter of fact, in November, 1942, installed, valued at $273,831.39?

A. I can't answer that "yes" or "no," because it depends on the way he has classified, in that appraisal, machinery and equipment. My appraisal of machinery and equipment includes boiler plant, production machinery, equipment in the office, and so forth, so that the figures that you are reading from wouldn't be the comparative figures in my appraisal, so I couldn't answer that "yes" or "no." I would have to have that classified the same way as I have it classified here.

Q. Very well. I will ask you to state, if, as a matter of fact, the fair value of the power equipment, as installed in that building on November 21, 1942, was not $62,928.08?

A. The fair value of the power equipment?

Q. Installed?

A. I call it boiler plant equipment, and I have, in a previous question answered what my figures were for [fol. 838] the items covered and I can not go beyond the items that I have included in that account, and it was not anything like that, $60,000.00. Now, I do believe that they have water softeners and other items in there, that they call power equipment, so again, our figures wouldn't be comparable figures. You are comparing two different things.

Q. But we apparently do have comparative figures for the sum totals? A. Of power plant?

Q. No, of the whole business, $647,000.00 plus, and $642,000.00 plus?

A. Yes, in fact, we are a little bit higher on our totals as the land is excluded. You have $30,000.00 on land, where I have $17,600.00, and my total figure evi-

dently is some $5,000.00 less than yours, so if you had the same land figures that we have, then I would have a somewhat higher figure than you have, if I understand your figures correctly.

Q. That is right. What I want to get at, if I can, is to exclude the value of the land and the building and we will take everything else, all in one, the machinery and equipment and power plant, water softeners, and everything else, and I will ask you if it isn't a fact that those [fol. 839] items, exclusive of the land and the building, did not have a fair and reasonable market value, as installed in that building in November, 1942, of $336,759.47?

A. I have got $270,771.75.

Q. We are speaking now of those figures which go to make up your total $642,925.20, is that right?

A. Just land and buildings?

Q. Now I am asking—

Mr. Murphy: I think counsel inadvertently is confusing himself and the witness by taking figures from the right-hand column and then in his question referring to figures in the left-hand column.

The Court: Yes, there is a confusion between the right-hand column, which shows the cost new of machinery and the figures that have been arrived at after the depreciation. That seems to be where you differ.

Q. Yes, that is right.

The Court: In other words, it is a question of what was the depreciation.

Q. Instead of an appraisal by an architect or builder who was familiar with that building, who built it, and the machinery and supply people, who installed and put in most of the equipment, and the boiler and power equipment people, who placed it in there and put it in there, [fol. 840] you have relied upon your experience to arrive at the total, $450,000.00? In other words, you did not go to the men here in the City or in Chicago, the American Laundry Machine and Supply Company, to get any of your figures, did you?

Mr. Murphy: Objected to as improper cross-examination and argumentative.

The Court: Sustained. It doesn't matter much. It is a matter of $5,000.00 higher in his figures than you are on the cost. It is a question of how he arrived at the depleciation and how did you arrive at the depreciation. That is the question. Which has the greater weight or worth is what we are trying to get at. He explained in detail how he arrived at his depreciation. Here are the figures.

Q. In arriving at your figure of $454,000.00 or $455,000.00, did you take into consideration the market value of the laundry machinery and equipment as installed in 1942?

A. The market value—yes, I have. The market value I considered to be the cost less depreciation of that machinery, not a summation of taking a piece here and selling it at a premium somewhere, and another piece elsewhere, and probably involves consideration of time and [fol. 841] liquidating it. I have taken it as a laundry unit and not segregating item by item, and probably somebody in distress would pay fifty per cent more than it is reasonably worth as a part of the laundry unit, because under that assumption, one would get into theoretical considerations that would be just impossible to come to any final conclusions as to just how that would be sold piece by piece, and in fact, impair the entire value. It would really be a liquidation value under that assumption, so I have taken it as a unit.

Q. From what you have stated, I suppose that also goes with your conclusions in connection with the building?

A. Well, the thing is different. We are getting into a liquidation value, which would be indicative of the rental.

Q. Nobody is asking you about liquidation value. That is not present in the case. We have a laundry that was a going concern on November 22, 1942, and what I would like to get from you is whether or not you considered the fair and reasonable market value of that laundry as a unit, as you put it, with a capacity as shown here that you have heard about, a capacity of doing a volume of business and desired by a person who owned

it in that condition and wanted it then? A. That is right. [fol. 842] Q. You say that you have arrived at that figure by taking the reproduction value and depreciated it by a certain amount of money, a certain percentage?

A. That is right.

Mr. Hotz: I think that is all.

Redirect Examination of Cornelius G. Weber by Mr. Murphy:

Q. While you have been testifying, I note you have some papers in your hand with some figures. May I see that? I think I may have a copy with both clipped together. Will you examine it and see if the copy I have, with all of the sheets clipped together, is a correct copy; in fact, a duplicate original carbon copy of the papers you have been testifying from? A. Yes.

Q. I will hand you what the Reporter has marked as Government's Exhibit 23, and ask you if that is the paper you have just examined and whether that is a correct copy of the papers you have had in your hand during your testimony and from which you have read various figures? A. It is.

Mr. Murphy: Petitioner offers in evidence Govern- [fol. 843] ment's Exhibit 23. You have a copy on your desk, counsel.

Mr. Hotz: We object to Exhibit 23 for the reason that the witness has not shown himself qualified to answer; he has not shown himself qualified to give the valuation of a laundry and the machinery and equipment therein on November 22, 1942; for the further reason he did not see the property in 1942, November of 1942; that the test is the fair market value of that property on November of 1942, and the method arrived at by the witness is incompetent as a method of arriving at valuation.

The Court: His testimony has long since gone into the record. This is merely a notation or summation of the facts and figures that he has testified to and is offered merely for that purpose. It is merely offered for the use of counsel on both sides of the case, and the Court and jury. Objection overruled.

Government's Exhibit 23, appearing in Vol. IV, at Page 1121.

[fol. Vol. IV, p. 1121] Gov't. Ex. 23

(Received)

EXHIBIT A

SUMMARY OF COST OF REPRODUCTION AND FAIR MARKET VALUE

	Cost of Reproduction	Estimated Accrued Depreciation Per Cent	Amount	Cost of Reproduction Less Depreciation or Fair Market Value
LAND	$ 17,600.00	0	0	$ 17,600.00
BUILDINGS				
Construction	183,347.59	25.00	$45,836.90	137,510.69
Plumbing	5,648.92	25.00	1,412.23	4,236.69
Sewerage	590.50	20.00	118.10	472.40
Heating System	3,630.28	30.00	1,089.08	2,541.20
Electric Lighting	7,031.46	38.95	2,738.91	4,292.55
Sprinkler System	8,160.50	27.11	2,212.11	5,948.39
Building Elevator	4,525.00	34.59	1,565.00	2,960.00
Fees 5%	10,646.71	25.82	2,748.61	7,898.10
Total of Buildings	223,580.96	25.82	57,720.94	165,860.02
MACHINERY AND EQUIPMENT				
Machinery: Comprising Boiler plant, Production Machinery and equipment, Water Heaters, Tanks, Plant Trucks, Scales, Plant Furniture and Fixtures and Office Equipment	372,368.80	32.41	120,672.18	251,696.62
Power Feed Wiring	9,200.13	30.00	2,760.04	6,440.09
Refrigeration Plant	2,126.00	25.00	531.50	1,594.50
Mfg. Piping	17,790.41	38.96	6,931.10	10,859.31

Telephone and A. D. T. Conduit	258.90	30.00	77.67	181.23
Total of Machinery and Equipment	401,744.24	32.60	130,972.49	270,771.75
GRAND TOT.	$642,925.20	29.35	$188,693.43	$454,231.77

U. S. ARMY Q. M. C. LAUNDRY
1504 Jones Street
Omaha, Nebraska

CONSTRUCTION

Five Story and part Basement, Brick, Reinforced Concrete and Steel Frame Construction Size 88'-0" x 132'-6" 5 bays wide by 6 bays long

Story Height	
Basement	12'-0" high
First Floor	17'-6" high
Second Floor	14'-0" high
Third Floor	14'-0" high
Fourth Floor	14'-0" high
Fifth Floor	14'-0" high
Parapet	2'-6" high
Gross Floor Area	63,016 sq. ft.

	Cost of Reproduction	Cost of Reproduction Less Depreciation or Fair Market Value
Excavation		
Basement, Elevator Pits, and Areaways	$ 3,668.14	
Foundation		
Trench and Pier Excavation, Concrete Wall and Pier Footings	8,282.89	

Walls	
Basement: Concrete and Brick Walls with Doors and Windows Superstructure: Common and Face Brick Walls with Terra-cotta and Stone Trim, Doors, Windows and Concrete and Brick Smoke Stack	53,215.02
Framing	
Basement to Fifth Floor of Reinforced Concrete Columns, Beams, Girders, and Wall Sprandels Roof framing of Steel Columns, Beams and Bracing	31,127.33
Floors	
Basement: Concrete Floor, Elevator Pit and Floor Trench First Floor: Concrete Floor on earth, reinforced concrete slab Second, Third and Fourth Floors: Reinforced concrete slab Fifth Floor: Terrazzo and part area concrete finish on Cinder Concrete fill and Reinforced Concrete slab	42,624.13

	Cost of Reproduction	Cost of Reproduction Less Depreciation or Fair Market Value
Roof		
Flat pitch, tar and gravel on felt base, insulation and precast concrete channel slab. Elevator and tank house, drainage, ventilator and flag pole	9,437.60	
Stairs		
Reinforced concrete and steel stairs	2,839.50	
Interior Finish		
Partitions, glazed tile wall finish, plastering, floor covering, accoustic finish, interior painting and spiral chute	29,637.98	
Exterior Fixtures		
Marquise, steel fire escape, common brick areaway with chute and salt chute	2,515.00	
TOTAL CONSTRUCTION	$183,347.59	$137,510.69

	Cost of Reproduction	Cost of Reproduction Less Depreciation or Fair Market Value
MACHINERY		
Boiler Plant		
Consisting of: Boilers, Stokers, Controls, Forced Draft Unit, Steam Floor Meter Unit, Ash Elevator, Ventilating Fans, Blow-off Well Condensate Receivers and Boiler-feed Pumps, including Wiring Connections between Motors and Starting Switches and Machine Foundations, but excluding Piping	$26,116.00	$12,151.45
Production Machinery		
Consisting of: Markers, Washers, Controls, Extractors, No-trux System, Drying Tumblers, Drying Cabinet, Flat Work Ironers, Shirt Finishing Systems, Conveyors, Pressers, Hand Ironing Units, Sewing Machine, Dry Cleaning Machinery, Garment Presses, Hat Cleaning and Blocking Equipment, Pillow Renovating Equipment, Curtain and Blanket Cleaning and Drying Equipment, Fur Renovating, Repairing Equipment, Refrigeration Equipment, Ventilating Fans		

	Cost of Reproduction	Cost of Reproduction Less Depreciation or Fair Market Value
Compressed Air Machinery, Circulating Pump, other Major Mechanical Production Units, including Wiring Connections between Motors and Starting Switches or Control Panels	$276,812.00	$192,072.00
Water Heaters		
Consisting of Kelly Reclaimer Heat Exchanger with Concrete Tank and Recording Thermometer and Storage Heater	$ 7,680.00	$ 4,524.50
Water Storage Tank		
Consisting of Cold and Hot Water Tank	4,678.00	3,832.10
Water Softener Equipment		
Consisting of One Battery of 3 Refinite Water Softeners, Brine Making Tank, Brine Pumps and Salt Reclaimer Tank	18,059.00	13,488.55
Plant Furniture and Fixtures		
Trucks, Scales, Fire Protection Equipment and Minor Equipment, Time Recorders and Auto Call Systems, Intercommunicating System, Night Bell Signal, Water Coolers, Fans	25,502.65	16,387.16

	Cost of Reproduction	Cost of Reproduction Less Depreciation or Fair Market Value
Office Furniture and Fixtures and Office Mechanical Equipment, Rest Room	13,521.15	9,240.86
TOTAL MACHINERY	$372,368.80	$251,696.62

Q. Do you know that an appraisal of this property we are talking about was made at the request of Mr. Jacobberger sometime prior to the time you were here in 1944, but some other appraisal firm?

A. I was so informed through the District Attor- [fol. 844] ney's office that there was another appraisal, and we went to secure that appraisal and contacted Mr. Harry Jacobberger, but he wouldn't make it available to us.

Q. Who was that appraiser?

A. I understood it was made by Lloyd Thomas, but I did not see the appraisal itself. As I said, it was not available.

Q. Does the American Appraisal Company, the company with which you are associated, also have offices in numerous major cities all over the United States?

A. Yes.

Mr. Murphy: That is all.

[fol. 845] Mr. Murphy: *It is stipulated that on November 21, 1942, petition in condemnation was filed in this court.*

Mr. Hotz: *Correct.*

Mr. Murphy: And attached thereto and duly certified a copy of a letter signed by Henry L. Stimson, as Secretary of War, and which letter was dated November

21, 1942, and addressed to the Attorney General of the United States, and reciting the findings and need of the War Department for the use of this particular property described in the petition herein.

Mr. Hotz: It was.

The Court: Does that specify the time?

Mr. Hotz: It is attached to the petition.

The Court: Does that instrument specify the time?

Mr. Murphy: And which said letter requested institution of condemnation proceedings for the term ending June 30, 1943, with the right and at the election of the Secretary of War, to use the property for additional yearly periods thereafter during the existing emergency as determined by the President. That, thereafter, on May 11, 1943, a motion to extend the term from July 1, 1943, to June 30, 1944, was filed in this action, together with a copy of a letter signed by the Secretary of War, [fol. 846] addressed to the Attorney General of the United States, finding the need for the extension of the term for said period of one year, and requesting said extension for said period; that, thereafter, on May 31, 1944, a further similar motion was filed herein for an extension of the term for the period ending June 30, 1945, and which motion had attached thereto a copy of a letter signed by the Secretary of War, setting out his finding of the need of the Government for the use of the property in question for such extended period, and requesting the Attorney General to secure such order for such extended period; that, thereafter, on May 28, 1945, a similar motion was filed in this proceeding requesting a further extension of the term to and including June 30, 1946, and which said motion had attached thereto a copy of a letter signed by the Secretary of War, finding the need by the Government for the continued use of the property here involved and as described in said original petition herein, for said extended period, and requesting the Attorney General to obtain such orders for said extended period, and that on or about the respective dates in this stipulation mentioned, orders were entered extending the periods as stated.

[fol. 847] Mr. Hotz: I admit the pleadings so show. There is no consent to these things by the respondent, Kimball Laundry.

The Court: The record so shows and it will save you, and for the purpose of this record, the orders should be either offered in evidence or stipulated to.

Mr. Hotz: It is okeh what he said.

Mr. Murphy: I think that covers it.

Mr. Crowder, having been previously called and duly sworn, was called by Mr. Murphy for further

Redirect Examination of C. R. Crowder by Mr. Murphy:

Q. You were requested by counsel for Respondents to check and learn the dates upon which the certain items of machinery and equipment were returned by the proper army authorities from Fort Omaha to the premises in question, and the number of truck loads involved in that transportation, as I recall the request. Have you made that checkup?

A. I have contacted the parties handling the transportation.

Q. What are the facts?

A. I found that there were eighteen truck loads; that is eighteen trips of trucks used, using army trucks from [fol. 848] the transportation department at Fort Omaha in transporting the 107 listings, or a total of 178, quantity items, from building 12, Fort Omaha, back to Kimball Laundry Company building, these trucks not being loaded to capacity.

Mr. Hotz: Just a minute. I asked for the number of trucks.

The Court: He has given the number. Go ahead. He is answering the question of counsel. You can straighten him out on cross-examination.

Mr. Murphy: You may take the witness.

Recross-Examination of C. R. Crowder by Mr. Hotz:

Q. You didn't see the trucks?

A. No, sir; I saw some of the trucks, yes.

Q. You didn't see the trucks, nor the loads in them, of this machinery?

A. I saw one or two of them when they pulled up in the Kimball Laundry Company building.

Q. One or two of the eighteen?

A. There were not eighteen different trucks I stated there were eighteen trips made. The trucks were not loaded to capacity.

Q. Why did you say they were not loaded to capacity?

A. For the simple reason they are not a highly efficient vehicle for stackage or placement of the materials [fol. 849] in the trucks, as would be required for a long distance haul, due to the fact it was a very short trip between Fort Omaha and Kimball Laundry Company.

MR. LEWIS SHOLES, produced and duly sworn as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. Murphy:

Q. Give the Reporter your name, please?

A. Lewis C. Sholes.

Q. Where do you live? A. Omaha.

Q. How long have you lived in Omaha?

A. I was born in Omaha seventy-eight years ago.

Q. And you lived here all your life? A. All of my life.

Q. What is your business, generally? A. Real estate.

Q. Have you had any particular training and experience in appraisal of real estate and industrial plants, particularly laundry plants? A. Yes.

Q. Will you detail your training and experience?

A. I have been in the real estate business for forty-six years and have been strictly in the appraisal business for about the last twenty to twenty-five years, and during that time have appraised all kinds of larger properties in Omaha and other cities, including Kansas City, Lincoln, and out throughout the state, such buildings as the [fol. 851] Stewart Building in Lincoln, and Miller Paine Building in Lincoln, the Blackstone Hotel here, the Hill Hotel, and then, I have appraised the Kimball Laundry, and I appraised six other laundries throughout the United States.

Q. Have you appraised some six other laundry plants in recent years in other cities in the United States?

A. Yes.

Q. In what cities?

A. Three in Denver, two in New York City, and in Kansas, and one in Boston, Massachusetts.

Q. Are you a member of any engineering association?

A. I am a member of the American Institute of Real Estate Appraisers.

Q. Are you engaged at this time in teaching, along with your other work?

A. Yes, I have classes out at the Omaha University.

Q. In what subject?

A. Fundamentals of Real Estate and Appraising, two different classes.

Q. You say you appraised the Kimball Laundry property here? A. Yes.

Q. When did you make that appraisal? A. 1946.

[fol. 852] Q. What month?

A. I think I got the assignment about the first of September.

Q. How much time did you spend in the appraisal of that institution? A. About six weeks.

Q. Were you there at the plant day after day?

A. Yes, every day during the entire time.

Q. Did you check the entire building, power plant and laundry machinery and equipment and everything there?

A. Yes, sir.

Q. Checked every individual machine?

A. Every item in the building.

Q. Did you list every item there? A. Yes.

Q. Was Mr. Goodwin, who has testified here as a witness for respondent, and an employee of the American Laundry Machinery Company, there working with you and consulting with you a considerable part of that time?

A. He worked with me after the inventory was made. When I was ready for reproductive cost prices, he gave me the prices and the weights, and we, together, figured

the freight rates and so forth, to establish the cost of installation.

[fol. 853] Q. Did that apply to the American machinery? A. Yes, sir.

Q. And did that firm furnish the major portion of the laundry machinery equipment in that plant? A. Yes, sir.

Q. Other machinery and equipment not furnished by the American Laundry, how did you check that?

A. I got that from the manufacturing representative, either by contract with agents in this vicinity, or by letter.

Q. In that manner did you determine the reproduction cost in each and all items as of that date, new?

A. Yes, sir.

Q. That was in the fall of 1942, just shortly prior to November 22nd of that year? A. Yes.

Q. Did you follow, throughout your work and appraisal, the recognized standard procedure in such appraisals? A. Yes, sir.

Q. Before I get into the details, I will hand you what the Reporter has previously marked as Government's Exhibit 19, and I will ask you if that list was complied by you? A. Yes.

Q. Is that the inventory listing all of the items appraised down there?

[fol. 854] A. Yes, sir. That is all of the items of machinery. This doesn't list some of the stuff that was classed as part of the building.

Q. The figures in the first column, are they the cost new figures of the various items opposite which they are listed?

A. That is the cost new, installed, in place.

Q. As of November, 1942? A. Yes.

Q. And the column to the extreme right, what is that?

A. That is the present value, it states here, but was the depreciated value of those items at the time of the appraisal.

Q. And did that constitute—the total of the column to the right constituted your valuation of the items as of that date? A. Yes, sir.

Q. And are these cost figures, so far as any American Laundry Machinery is concerned, figures you obtained with the cooperation of their man, Mr. Goodwin?

A. Yes, sir.

Mr. Murphy: Government now reoffers in evidence Exhibit 19.

Mr. Hotz: We object to the offer of Exhibit 19, because [fol. 855] there is nothing on the exhibit to show where the property is located, what the property is, or what the items are. The witness had had previously a document from which these indexes and numbers might have been made. There is no way of checking, at all, with anything we have, and we object to it on the grounds it is not competent because it can not be identified unless each item is gone through and identified.

The Court: If that is necessary, that is what you will have to do. It is for you to do by your cross-examination and learn what it purports to be. I have no way of helping you other than requiring a proper foundation for the document. The foundation has been laid here, not only by this witness, but by the witness, Mr. Goodwin.

Mr. Murphy: Mr. Weber and Mr. Goodwin.

The Court: Mr. Weber and Mr. Goodwin referred to it. Now then, there is a witness on the stand who handled it and knows what it is. We will receive it, and your cross-examination, you can inquire, if you must, about each item.

Government's Exhibit 19, found in Volume IV, at page 1118.

[fol. 1118] Government's Ex. 19 Received

INVENTORY

The following pages set forth an inventory of the machinery, furniture, fixtures, and miscellaneous items, appraised by floors.

Plans showing the approximate location of the machinery and fixtures follow the inventory of the second, third, fourth and fifth floors. Machinery is identified on the plans by numbers, and fixtures are identified by letters corresponding to the index numbers and letters in the inventory.

Q. I wish you would please compare that—I think you have already rechecked with Respondent's Exhibit 21, and with Government's Exhibit 18, and tell me whether or not the items listed on all three are the same and in the same order?

The Court: And numbered the same?

Mr. Murphy: No, I will come to that in a moment.

[fol. 857] A. This is the same as that photostatic copy. Yes, I spot-checked that and they are the same, except that they are numbered consecutively here instead of by floors.

Q. In your original you numbered them by floors?

A. Yes.

Q. And in Government's Exhibit 18 there are two rows of numbers to the left, one being a strictly consecutive numbering, is that correct? A. Yes.

Q. I will ask you whether those numbers in the extreme left column of Government's Exhibit 18 are not in the same form and opposite the same items as in Respondent's Exhibit 21?

Mr. Hotz: What column in 21?

Mr. Murphy: The extreme left.

Mr. Hotz: Cost installed?

Mr. Murphy: The item number at the extreme left is what I am referring to.

Q. In your appraisal did you cover certain items under the heading Power Plant Machinery, and other items under the heading Laundry Machinery and Equipment?

A. Yes, in my description—I did not itemize some items as productive machinery. They are itemized as certain items that go together, but I have made an [fol. 858] analysis of the different figures.

Q. All items are in your appraisal?

A. Yes, everything.

Q. But some you may have considered under one heading is not necessarily considered by someone else under the same heading? A. Correct.

Q. That is a matter of opinion, I take it? A. Yes.

Q. To avoid confusion, I will hand you Respondent's Exhibit 23, listing the items which they have referred to

under the heading of Power Plant, and ask you whether you, in your appraisal, included all of those same items under that same heading? A. No, I did not.

Q. Will you name the items there that you did not include in your appraisal under the heading Power Plant?

A. Ash hopper, heat reclaimer, cold water tank, hot water tank, hot water heater, water softeners, salt reclaimer, brine circulating system, K. V. A. capacitor, and air compressor installation.

Q. Those items you have just listed, as I understand it, you have excluded from your list of Power Plant items, but do include them under some other heading in your [fol. 859] approval? A. Yes.

Q. So that your appraisal covers everything, no matter how it may be listed?

The Court: Under what other heading can we find these items?

A. Under the heading of Building, if they are not included in that other list. Some of them may be in that other list. I don't think so.

Q. Have you had compiled, under your immediate direction, a summary of your appraisal? A. Yes, sir.

Q. Do you have a copy of it there? A. Yes.

Q. I will hand you Government's Exhibit 24, and ask you to examine that and state whether or not that is the summary of your appraisal, compiled under your direction? A. It is.

Q. Does it correctly reflect the items and figures thereon appearing? A. Yes.

Q. What in your opinion was the fair and reasonable value of the land involved and upon which the Kimball building is situated, as of November 22, 1942?

[fol. 860] A. $17,600.00.

Q. And in all of these questions, at the moment at least, I am referring to the same date, November 22, 1942, and the premises involved in this action, the Kimball Laundry matter. A. I understand.

Q. What in your opinion was the fair and reasonable value of the building as of that date?

Q. What do you find the annual return on investment item to be over that entire period, the total of that item?

A. $94,294.80.

Q. And how much depreciation, both normal and including the $9,000.00 additional for excessive use? What does that amount to for the entire period I have mentioned? A. $115,992.00.

[fol. 868] Q. And the items for taxes, insurance and miscellaneous expense, carried over the entire term I have mentioned, amounted to what?

A. Including that management charge, $26,100.00.

Q. And those total what? A. $236,386.80.

Q. Does that last figure, in your opinion, constitute the fair and reasonable rental value of that property, including the general additional and excessive use over the period of November 22, 1942, to and including June 30, 1946? A. Yes.

Q. From your recent survey, did you find that there were probably some few additional items of restoration not to be figured out over the term, but which should be done now, or whenever the property is turned back?

A. Yes.

Q. What do those amount to?

Mr. Hotz: Just a minute. I object to the witness not having shown himself qualified to answer anything about restoration values.

The Court: Overruled.

Q. Did you personally check the items involved?

A. Yes.

[fol. 869] Q. And make inquiry from the contractors or material men that furnish those things?

A. Yes, or take the figures from other sources where the figures were available.

Q. Reliable figures? A. Reliable figures.

Q. Did you do that in the usual and accepted way of making these appraisals? A. Yes.

Q. What was the first item you have under that?

Mr. Hotz: We object. The witness has not shown himself qualified to answer; not the best evidence; not the proper way to prove the matter of restoration or values.

The Court: Overruled.

A. I observed the floors needed patching and I estimated $2400.00 for patching flooring.

Q. Let me interrupt a moment there, Mr. Sholes. You were in this plant several days back in September and October, 1942, were you? A. Yes.

Q. Did you observe the mastic flooring in that plant at that time? A. Yes.

Q. Was it all nice and smooth and level, or had it been [fol. 870] worn and patched when you were there back in the fall of 1942?

A. They patched it while I was there.

Q. While you were there they did some patching on it? A. Yes.

Q. That is, Kimballs did? A. Yes.

Q. Patched worn parts?

A. Yes, from the elevator and around through the wash racks.

Q. What next item did you think should have some additional attention over and above the amounts included?

A. Repairs to the concrete where they backed trucks upon the sidewalk, $256.00.

Q. And the next item? A. Windows, $194.00.

Q. And the next item?

A. The building, when the army went in, was in very nice condition in regard to the walls and ceilings and paint, generally, so I figured that to restore it, as an item of maintenance that should be taken care of and which had been deferred, repainting, $8,389.00.

Q. And the next item?

[fol. 871] A. That is the item of painting the fixtures. By the fixtures, I mean tables and racks and portable equipment. When I observed the laundry the first time, just thirty days before it was turned over to the government, all those fixtures were being sprayed with gloss enamel. That has been chipped and is dirty and needs to be redone and I estimated that cost $750.00.

Q. Are you, in these figures, now picturing and having in mind getting this plant back in the same condition in which you observed it in October of 1942?

A. Yes, in what I would consider would be its condition if a normal maintenance of these items had been carried out on down the period it has been under government use.

Q. Some of these items we are now on were what may have been done under normal maintenance, but were not done, so you are adding them to your appraisal, is that right? A. Yes.

Q. All right. The next item?

A. Elevator repairs, $665.00.

Q. Did you check on that to determine whether some of those repairs are to be made anyway under the con-
[fol. 872] tract with the Otis Elevator Company?

A. On that I wasn't sure about the condition of the elevator. It was working all right, apparently, but I saw the engineer's figures for some elevator repairs and I took that figure as being a necessary repair, whether that is in excess of normal wear—I believe probably it was so.

Q. Did you do that as an extra precautionary measure? A. Yes.

Q. And the next item?

A. The same is true of electrical repairs. I took the electrical engineer's repairs on that of $774.00.

Q. And the next item?

A. And the fifth floor, that is the figure the engineer had established for removing a room and cleaning up to some things on that floor, and polishing the terrazzo.

Q. That was something you had not included in your rental appraisal?

A. No, I thought that was part of maintenance that should have been taken care of.

Q. And one further item?

A. Machinery and fixtures, $3,075.00.

Mr. Hotz: You didn't give any figure on the terrazzo.
[fol. 873] A. Fifth floor, the whole thing together, $237.00. That includes fixing up some tile that has been chipped where trucks have hit it on the corner near the elevator and fixing the terrazzo floors, to do those things

I observed there, and the other, $3,075.00, are various items that I observed around there that I thought should be fixed, fixtures broken, slats and some of the casters were badly worn, and various items of machinery and fixtures so I just went over and kind of made a mental note—I didn't itemize them, but I figured I had made a sufficient allowance to cover the repair of those fixtures and replace them.

Q. What do all these additional items total up, or amount to? A. $16,680.00.

Q. Did you add that to the figure of $236,386.80 which you used a while ago? A. Yes.

Q. What, then, is the total you arrived at?

A. $253,066.80.

Q. In your opinion, does that figure $253,066.80 cover and include anything and everything due Kimball Laundry Company for the use and occupancy and including restoration of this former Kimball Laundry Plant?

[fol.874] A. No, it does not include the replacing of any machinery that has been moved.

Q. Resetting it? A. Resetting it.

Q. Aside from that, is there any other item? A. No.

Q. Is this, in your opinion, a fair and reasonable amount, except for that one possible item of some removing and relocating some of the machinery in there, does this sum of $253,066.80, in your opinion, constitute the fair and reasonable and the total fair and reasonable value of the use of this property over the term stated, including all restoration and renovating costs?

A. Yes, sir.

Mr. Hotz: May the answer go out?

The Court: Strike it.

Mr. Hotz: Respondent objects to the question upon the grounds that the witness has not shown himself qualified to answer; therefore, incompetent; that he proposes to arrive at figures of valuation in a manner that is not permissible under the laws of evidence, by taking certain figures that were given to him by somebody else [fol. 875] and depreciating them in his own way, and he has had no experience in the operation or handling

First Floor—Supply Room.

ear	Item	Cost Installed	Present Value
1	Counter—Zinc Top—L. 21'6" x4'x32" Ht. 6 Drawers—W. 32" Ht. 18"	$ 94.00	$ 80.00
2	Shelving above to Ceiling—2x 2 frame 36" cc 17'Ht. 17" Deep —7 Tiers shelves	56.00	50.00
3	Mildrant Ladder—12' 8" x 17" with Tract 12'8" above floor	35.00	25.00
4	Shelving 2"x2" Frame—W. 10' Ht. 9' 9" — 5 shelves 24" 5 Drawers below	50.00	40.00
5	Open Padding Roll—Cabinet W. 7' Ht. 8' D. 36" Solid back and sides	40.00	30.00
6	Shelving 2" x 4" frame—W. 9' Ht. 6' 6" D. 39"—4 shelf	27.00	25.00
7	Shelving 2" x 4" frame—W. 6' Ht. 6' 6" D. 25" 4 shelf	12.00	10.00
8	Cupboard Beaded Ceiling—W. 5' 7" D. 36" Ht. 6' 2" 5 Shelf —2 Door	47.00	28.00
9	Counter—Mill constructed—L. 10' 6" D. 32" Ht. 30"—4 Drawers Shelves above—L. 8' D. 24" Ht. 42"	70.00	49.00
10	Flat Top Oak Desk 32x52	45.00	15.00
11	Table—39"x8'8"—Linol'm Top	27.50	25.00
40 12	Addressograph—Model 1700-B298321—120 Plate Drawers	561.88	490.00
13	Flat Top Desk—27x36	25.00	15.00
41 14	Multilith Duplicator	418.70	377.00
38 15	Graphotype and Stand	105.00	75.00
16	Balcony and Racks	400.00	300.00
		$2,014.08	$1,634.00

The totals of each of the rooms are as follows:

	Cost Installed	Present Value
Panel room	$120.50	$ 62.50
Shop	873.00	617.50
Delivery room.	933.00	535.00
Offices	12,139.06	8,956.16
Machinery, second floor	101,698.07	53,673.86
Fixtures, second floor	2,555.00	2,335.95
Miscellaneous, second floor	2,468.74	1,964.31
Machinery, third floor	87,676.68	57,465.12
Fixtures, third floor	2,649.75	2,036.65
Miscellaneous, third floor	3,311.62	2,462.31
Machinery, fourth floor	84,228.44	54,191.78
Fixtures, fourth floor	2,423.05	2,194.00
Miscellaneous, fourth floor	2,606.03	1,882.14
Machinery, fifth floor	21,569.27	15,463.30
Fixtures, fifth floor	2,527.47	1,768.00
Lunchroom, fifth floor	1,284.50	680.00
Miscellaneous, fifth floor	816.35	616.47
Totals	$329,880.53	206,906.05

Q. I will ask you whether or not you know of your own knowledge that Exhibit 19 comprises what is stated [fol. 856] on the first page thereof, as follows: "The following pages set forth an inventory of the machinery, furniture, fixtures, and miscellaneous items, appraised by floors. Plans showing the approximate location of the machinery and fixtures follow the inventory of the second, third, fourth and fifth floors. Machinery is identified on the plans by numbers, and fixtures are identified by letters corresponding to the index numbers and letters in the inventory." A. That is right.

Q. Is that exactly what this is? A. Yes.

Q. Did you furnish a copy of that, or was a copy of that list, the figures on the right, furnished to Mr. Weber of the American Appraisal Company? A. Yes.

Mr. Hotz: Objected to, the witness not having shown himself competent to give an appraisal of the building.

The Court: Overruled.

A. $190,000.00.

Q. And what in your opinion was the fair and reasonable value of the power plant, including the items you have under power plant? A. $12,500.00.

Q. What in your opinion was the fair and reasonable value—

Mr. Hotz: Just a minute. Could I have that objection in ahead of the power plant, please?

The Court: Certainly.

Mr. Hotz: The witness not having shown himself competent to judge values of the power plant.

The Court: Overruled.

[fol. 861] Q. What in your opinion was the fair and reasonable value of the machinery and equipment, including all machinery and equipment, everything down there that has not been included in the first three items, as of the same date?

Mr. Hotz: Objected to as the witness not having shown himself qualified to know the value of laundry machinery and equipment installed.

The Court: Overruled.

A. $213,400.00.

Q. What in your opinion was the fair and reasonable value of the entire physical plant, including land, building, power plant, machinery and equipment, as it stood there, complete, on the 22nd day of November, 1942?

A. $433,500.00.

Q. Did you also appraise and determine what in your opinion was the fair annual rental value of that property at that time? A. Yes.

Q. What was the first item that you have, whether it was the first that you may have considered at the time or not, making up an element of that rental value?

Mr. Hotz: Objected to as incompetent, irrelevant and [fol. 862] immaterial; not a proper method of arriving at a temporary use, and the witness not having shown himself competent to judge the value of a laundry.

The Court: Overruled.

A. In my first estimate, the return on investment, what I considered a justified return on the capital investment—

Q. Let me interject a question or two here. In these other appraisals that you have made, and particularly appraisals over the country of laundries, did you appraise both the value of the plant and the rental value? A. Yes.

Q. Have you done that in many industrial cases?

A. Yes.

Q. Have you testified in court many times in various actions involving appraisals of land and industrial plants?

A. Yes, a number of cases.

Q. Including rental and use value? A. Yes.

Q. And has your testimony been received in those cases? A. Yes.

Q. Now, referring back again to the item in question, tell us what percentage figure you used and what return [fol. 803] on investment you determined as fair and reasonable? A. On the land and building I allowed a return of five per cent.

Q. Per annum?

A. Per annum, of $10,380.00. That includes everything, being land and building; and a return of seven per cent, or $15,813.00 on the machinery and equipment, giving a total return on the invested capital of $26,193.00.

Q. Your percentage is two per cent higher on machinery and equipment than on building. Is that because of the difference of the nature and use of the item?

A. I would consider that five per cent could be classed as a fair normal return upon investment, but in that type of property there are certain risks involved in anticipation of life, and so forth, so that I allowed two per cent for a risk rate, making it seven per cent.

Q. What next item do you take into consideration in arriving at the fair rental value? A. Normal depreciation.

Q. Will you detail just how you subdivide it and what percentage you figured? A. Separate items?

[fol. 864] Q. In the total of such normal depreciation?

A. Land value, $17,600.00, I considered as stable and steady in perpetuity, so that there would be no deprecia-

tion on the land value. The building, $190,000.00, I figured had a life of forty years under normal conditions, giving a return on that as depreciation, per annum, of $4750.00. The power plant I valued as of that date as being $12,500.00, and I anticipated that had only a future life of about five years, and so I allowed it twenty per cent depreciation, or $2500.00 per annum. Machinery, $181,000.00, of the item machinery and fixtures, I gave the machinery items, that is, productive machinery, the operating machinery, eight per cent per annum, or $14,480.00. The fixtures, valued at $25,000.00, three per cent, $750.00. Miscellaneous equipment, which were expendable, I gave an average of ten per cent, or $740.00 for a value of $7400.00.

Q. And that made a total of how much normal annual depreciation? A. $23,220.00.

Q. What do we mean when we say "normal depreciation"?

A. That was what I would consider under a usual normal weekly run of one shift.

[fol. 865] As I understand the plant had been running previously?

A. Yes, under its use and as I observed it at that time.

Q. What other items did you include in arriving at elements concerning its use and rental value?

A. Real estate and personal taxes upon the property, $4500.00. That was taken from the actual tax assessed values as taxed at that time.

Q. You checked that tax item and found it to actually be $4500.00 per year at that time?

A. I made it in round figures. I think it was maybe a dollar or so underneath that.

The Court: You say tax values; you mean tax levies?

A. Tax levies, yes.

The Court: The actual taxes levied against the property?

A. Yes, sir. And then I allowed for insurance $750.00.

Q. That would be the annual premium of insurance?

A. Yes.

Q. And then did you include another item?

A. I allowed $2000.00 per annum for what I would term management, or to the lessor, for the accounting and collecting of rents and looking after his property, making a total of $7250.00.

[fol. 866] Q. What then did those items of return on investment, normal depreciation and these taxes and insurance and general company expense items total as an annual rental? A. $56,663.00.

Q. Is that your opinion of the fair and reasonable rental or use value of this property under normal use?

A. Yes, sir.

Q. Now, did you understand at that time that the army was going to take it over and that they would use it to a fuller capacity?

A. Not at that time. Later I was asked to estimate what would be a rental for an overtime or heavier use, and I estimated that.

Q. As a matter of fact, you have been back in the plant several times since, haven't you? A. Yes, I have been in there. I have been in there recently, the last two or three days. I was there in 1942 and I was in twice since then. I was in once prior to that.

Q. So you have a personal knowledge, pretty well, of the use to which it has actually been put?

A. Yes, sir, I saw it in operation.

Q. So, did you then add something per annum in the [fol. 867] way of rental additional because of the fact the army was using it more hours and to a larger capacity? A. Yes.

Q. And how much per year did you add as an allowance to cover that excessive or additional use?

A. $9,000.00.

Q. What in your opinion is the fair and reasonable rental for that property we are talking about, including the use to which it was put by the army? A. $65,663.00.

Q. That would be per year? A. Per year.

Q. Have you computed the rental use and value of that property over the term of November 22, 1942, to June 30, 1946, inclusive? A. Yes.

of machinery or equipment and he proposes to be a real estate man largely and primarily; that he is incompetent to judge values of any of the items such as floors, repairs to the building, windows, elevators, terrazzo floors, and especially machinery and fixtures, and that, by his own statements on the stand, he has been shown incapable of judging.

The Court: Overruled. Now, insert the answer.

Q. The answer was "yes"? A. Yes.

Q. Again I will hand you Exhibit 24 and ask you whether that exhibit correctly reflects a proper compilation of the figures you have just testified to and the items referred to? A. Yes.

Mr. Murphy: Petitioner offers in evidence Exhibit 24, of which counsel has been furnished a copy.

Mr. Hotz: Object to the offer of this exhibit and introduction of it upon the grounds the witness who apparently compiled it, or had it compiled, the witness on the stand, has shown himself to be wholly incompetent to arrive at the figures stated in the exhibit; he has had [fol. 876] no experience in connection with many of the matters therein set forth, and the exhibit might possibly be prejudicial in the manner in which it is gotten up, and the most important thing, of course, it is not the best evidence of the valuations that even the witness has put in there, which were given to him by somebody else.

The Court: The exhibit, I take it, is a summation of the testimony which he gave, and reflects totals from his testimony. It is not received as prime evidence in the case, nor will it be considered as that. His evidence is the prime evidence and that is already in the record. This is merely a statement drawn for the assistance of the court and jury. Also it assists counsel. Overruled. It will be received.

Government's Exhibit 24, found in Volume IV, at page 1122.

[Vol. 1122] Gov't Ex. 24 (Received)

Appraised Value, Nov. 22, 1942

Land	$ 17,600.00		
Building	190,000.00		
Power Plant	12,500.00		
Mch. & Equipment	213,400.00		
Total	$433,500.00		
ANNUAL RENTAL VALUE			
Return on Investment			
Land and Building	$207,600.00 @ 5%	$10,380.00	
All Mch. & Eqpt.	225,900.00 @ 7%	15,813.00	
Total Annual Return on Investment		$26,193.00	$26,193.00
Normal Depreciation			
Land	$ 17,600.00	None	
Building	$190,000.00 @ 2.5%	$ 4,750.00	
Power Plant	12,500.00 @ 20%	2,500.00	
Machinery	181,000.00 @ 8%	14,480.00	
Fixtures	25,000.00 @ 3%	750.00	
Misc. Eqpt.	7,400.00 @ 10%	740.00	
Totals	$433,500.00	$23,220.00	$23,220.00
Miscellaneous Items			
Taxes	$ 4,500.00		
Insurance	750.00		
General Corp. Exp.	2,000.00		
Total	$ 7,250.00		$ 7,250.00
TOTAL NORMAL RENTAL			$56,663.00
ADD FOR EXCESSIVE USE			9,000.00
TOTAL ANNUAL RENTAL, INCLUDING EXCESSIVE USE			$65,663.00

TOTAL SUM

Annual Return on Investment	$26,193.00 for 3.6 years —	$ 94,294.80
Annual Depreciation including excessive use	32,220.00 for 3.6 years —	115,992.00
Annual Tax, Insurance & Misc. Expenses	7,250.00 for 3.6 years —	26,100.00
Total		$236,386.80
Additional Restoration Costs not Included in above items		16,680.00
TOTAL, ALL ITEMS		$253,066.80

Additional Restoration Costs not Covered by or Included in Above Allowances for Normal Depreciation and Excessive Use:

Repair Flooring	$2,400.00
Repair Concrete	256.00
Windows	194.00
Painting Building	8,389.00
Painting Fixtures	750.00
Elevator Repairs	665.00
Electrical Repairs	774.00
5th Floor	237.00
Machinery & Fixtures	3,075.00
Total	$16,680.00

Cross-Examination of Lewis Stoles by Mr. Holz:

Q. You have been a real estate man here in the city of Omaha for a great many years, have you not? A. Yes.

Q. And the first time you ever had anything at all to do with a laundry was Kimball Laundry Company, after [fol. 877] you became a member of the land department of the government?

A. I wasn't in the employ of the land department of the government. I was employed to make this particular appraisal, the first work I ever did for the government.

Q. You never had done anything in connection with laundries prior to that time?

A. I had never appraised a laundry, no.

Q. You never bought and sold any laundry machinery or equipment? A. No.

Q. Never bought and sold any power equipment, special power equipment such as used in that laundry?

A. Oh, yes, I have handled it and bought it, had it installed in buildings. I have had to do with power equipment in office buildings and in elevator operations with large buildings, air conditioning equipment in large buildings, and for two years I was in the mining business in Cripple Creek and operated a boiler and ran an air compressor and other machinery in connection with that plant before I went into the real estate business.

Q. Did you have anything to do with the power equipment particularly adaptable for the use of laundries such [fol. 878] as they had in there, such as softeners and reclaimers?

A. Not that same type, exactly, no; but I have had to do with water softeners.

Q. You wouldn't know the capacity of those boilers at the Kimball Laundry if you saw them unless somebody told you?

A. They are rated. You can get the ratings and from the ratings you can determine from the manufacturer, the cost, and we do that right along in the appraisal of industrial plants.

Q. You wouldn't know anything about the cost of a draft indicator?

A. Not without going to the manufacturer.

Q. And you never sold or installed, as a contractor, any of such power equipment as you found there?

A. I never have installed it myself, but I have had it installed and have had figures. I can compute the cost of piping, plumbing fixtures and connections, from my experience with appraisals.

Q. What does a 300 horsepower boiler—we will take a 225 horsepower boiler, cost to install?

A. At a rule of thumb, installed with auxiliary equipment, is about $50.00 per horsepower.

Q. What would be the cost of a heat reclaimer installed?

A. I couldn't tell you without going to the manufacturer.

[fol. 879] Q. Do you know anything about the different styles of heat reclaimers?

A. Yes, I know about heat reclaimers. We have them in many buildings of different types.

Q. About the machinery and equipment, I am talking about the laundry machinery and equipment in that building down there—you couldn't tell us the cost of installation and the value of that machinery and equipment of your own knowledge, Mr. Sholes?

A. I could. I could sit down and take any one of those machines. I did it in many instances to check the piping and the fittings and the different items and figured the hour time and figured out what it would cost.

Q. Where did you get your information from?

A. From my experience.

Q. From your experience in the laundry business?

A. No, from my general experience in appraisals and in building costs.

Q. But, you never have bought and sold any laundry machinery and equipment? A. Never did.

Q. And never installed any?

[fol. 880] A. I never installed that kind of a machine.

Q. What you did was use your intelligence, the same as I might and go down there and see some machinery, ask some questions, write in and get its value and try

to arrive at a conclusion as to what I thought it was at that time?

A. The method of appraising and getting value on machinery and equipment is to find out what the costs are, to find out the drayage from the depot, if it is shipped into the building and into place, and then take fittings and appliances and labor prices to connect it up, and that carries you to total cost of installation.

Q. In connection with the building down there, when you went down, as your first job for the government, what had you been doing right up to that moment you went down there? What was your work?

A. I was doing appraisal and was in charge of the city loan department of the Ohio Life Insurance Company.

Q. Weren't you working for the P. W. A. in connection with getting out assessments in the city of Omaha? Didn't you do that work?

A. I was employed by the county to supervise the reappraisal by the W. P. A. I wasn't on W. P. A.

[fol. 881] You got paid by W. P. A.?

A. No, sir, I did not. I got paid by Douglas County.

Q. You heard about that since, I think, some of those appraisals?

Mr. Murphy: Objected to.

The Court: Yes, let's stay with our case.

Q. Handing you Respondent's Exhibit 21, the Kimball Laundry Exhibit 21, you have seen that before, have you not? A. Yes.

Q. I will let you have that in your hand. I have a paper here in my hand which I will not mark for the time being as an exhibit, but I will ask you to state—

The Court: Better identify it some way in the record if you are not going to mark it as an exhibit.

Mr. Hotz: We will have it marked.

Q. When you started to work down there for the Kimball Laundry Company you made up a list of everything that was down there so far as contents were concerned, is that right?

A. Everything in the way of machinery and fixtures and all those items that could be considered necessary for the operation. I didn't take in any parts, soaps, supplies or anything of that nature that were laundry supplies.

[fol. 882] Q. I understand that. From this paper that I have had marked Exhibit 46, are you familiar with the markings on that and that document? Have you seen it before? A. I don't know that I ever have.

Q. Are any of the figures on it yours?

A. No, I don't think so.

Q. Did you look it over rather carefully?

A. If they are my amount, somebody else put it in because I never wrote a sheet like this in my life.

Q. Is not that the work sheet that was used by you and Mr. Goodwin in the beginning? A. No.

Q. Did you have a work sheet that was used by you and Mr. Goodwin in the beginning?

A. I have a big book with loose pages with the inventory in and we went through and turned the pages and compiled the inventory from that, and I don't know whether I have got that at home now or not. There was no typewritten list at the time Mr. Goodwin and I went over it.

Q. Take Exhibit 21, please. That is Kimball Laundry Company's Exhibit 21, and I will ask you to state whether or not that exhibit contains the items that are on Government's Exhibit 19, and I will hand you also [fol. 883] this Exhibit 46, and take Exhibit 19—my purpose, what I want to do, if I can, so you will know what I am driving at, is to see if there is an affirmance of this original cost item and the number of these items, 594?

A. I think that is correct, 594. I don't know what these figures are.

Q. What I am getting at is this—

A. Whose figures are they?

Q. I suppose you and Mr. Goodwin made those up together and I am asking you if, at the beginning, you

and Mr. Goodwin had gone back and got original cost figures?

A. We got original cost, but the cost figures I used are not the figures in entirety that Mr. Goodwin gave. All he gave me was cost and we figured freight and then he would give me the idea of what he thought the drayage was and what he thought installation was. I did not take his figures on drayage or installation. Those figures I readjusted according to my own method of scaling by going to the drayage companies and finding out definitely what such and such a machine could be planted in the building by somebody who had done that work and therefore established and gotten a definite fac-
[fol. 884] tor of drayage cost.

Q. Understand, I am addressing myself to you on column one, not column two or three.

A. The cost installed—that is what you said.

Q. Just look at the top, please, of Exhibit 21, so we won't mistake each other.

Mr. Murphy: I ask counsel to be fair with the witness. What the witness just said is exactly what is at the top of the column. You are asking about cost installed.

Mr. Hotz: That is our installed cost in 1942. That is what I am getting at.

The Witness: This cost?

Q. Yes. A. I don't know what these costs are.

Q. Did you arrive at original costs in your beginning down there? A. Yes.

Q. What was it?

A. I don't know that I have them down—well, I can give them to you. They are all in sub-totals here.

Q. That is what I was kicking about in that Exhibit 19. I couldn't make heads nor tails of it.

A. Maybe I can get them somewhere else. That won't
[fol. 885] fit in exactly with this.

Q. How near is it? We won't squabble about a few dollars.

A. I can give you a summation so you can figure it all out. I have the total cost of $660,474.36. That is everything, land, building, machinery. That is replace-

ment cost of the entire plant, land, building, machinery and everything I appraised, new.

Q. That is as of November, 1942? A. November, 1942.

Q. That doesn't propose to show what went in there in the past years, or anything of that sort? That would be just the reproduction value in 1942.

A. Yes, if you wanted to go out and buy at that time.

Q. Now, then, our items for that year is in the sum total of approximately $645,000.00, as testified to by our witnesses, $645,000.00 or $650,000.00, so we are not far apart on that basis?

The Court: This is no time to take up the attention of the court, making comparisons now. We will adjourn now until ten o'clock in the morning.

Attorney MacLeod Excused

Mr. Murphy: May I take a brief moment for something I would like to have in the record? As the court [fol. 886] knows, Mr. MacLeod, who is not taking any active part in the trial, must return to his duties in Washington and probably plans on leaving tomorrow or a little before noon. I would like to know if it is permissible for the court to excuse him?

The Court: Under the circumstances, I will be glad to excuse Mr. MacLeod and I express to you our appreciation of your attendance in court and I am delighted indeed to have this opportunity of getting acquainted.

Mr. MacLeod: It is mutual, sir. Thank you.

March 15, 1946.

Q. I think the last figure you gave, Mr. Witness, when you were on the witness stand, was the total replacement value, $660,474.36, is that right?

A. That is correct.

Q. When you made your first appraisal of this whole business down there, the land, building, machinery and power plant and all, you did it in October of 1942, did you not? A. Yes, through September and October.

Q. And you arrived at the figure of $433,500.00?

A. Yes, sir.

Q. And you arrive at the same figure, $433,500.00 today?

[fol. 887] A. November 22nd.

Q. Of what year? A. 1942.

Q. What figure do you arrive at today?

A. I haven't figured any figure today.

Q. In making your estimate of some of these matters that go to your idea of what the Jacobbergers' laundry company should be paid as a fair amount of money, you, as I have i added $9,000.00 to the figure of $56,663.00 for excessive use? A. Yes, sir.

Q. For what period? A. Per annum.

Q. $9,000.00 per annum for excessive use? A. Yes.

Q. What was your excessive use based upon?

A. More operating hours of the equipment, which would accelerate the use and depreciation of the machinery, and it would accelerate with years of use, so that, taking the figure of $9,000.00 in the first year, the total depreciation for that year on the value of the equipment would be approximately twelve per cent. The payment of the rental allowed in the depreciation would reduce the value of the equipment, so that at the second [fol. 888] year, the rate of return on the remaining value of the equipment would be at a higher rate, so that it would be accelerated up to twelve to pretty close to fifteen per cent, and the third year close to twenty per cent, and the fourth year twenty-five per cent, and so on, when the plant was run, so that, under a rental per year for use your rate of depreciation accelerates on a fixed rental.

Q. Where did you get the idea from? Is that your own? A. It is my own.

Q. In these other laundries you had anything to do with for the government, did they ever get to the point where your ideas were presented to a court for approval or used in a legal proceedings such as this?

A. No, we settled all this and accepted the rental on this same basis. Once in a while there was a slight adjustment made, but generally it was accepted in all the other laundries I appraised.

Q. What about the New York case?

A. The Quartermaster did not take the laundry in that case.

Q. So that kind of went by the boards?

A. Yes; that was not on account of the rental. The laundry was not acceptable to the Quartermaster after [fol. 889] the appraisal was made because of the design of some of the washers.

Q. You didn't get very much experience out of that?

A. I did on the appraisal.

Q. It was never accepted or used?

Mr. Murphy: Objected to as argumentative.

The Court: Sustained.

Q. What about the one in Massachusetts?

A. That laundry was leased.

Q. Did you have anything to do with that?

A. I made the appraisal.

Q. Of what? A. Of the laundry.

Q. The building and the real estate?

A. I did not appraise the real estate. I appraised the machinery and equipment in the laundry and the laundry men did the real estate and we jointly signed the report.

Q. What became of that situation?

A. They accepted the rentals, as I understand.

Q. Finally there was a lease agreed upon between the parties? A. Yes.

Q. You don't know whether they accepted your figures or not?

[fol. 890] A. I don't know exactly what the figures were.

Q. I didn't think so. You did two laundries out in Denver, at Columbine and the Goodheart laundry?

A. Yes.

Q. What did you have to do with them?

A. I sat in on the adjustment of those and they adopted the rental about on the appraised figures. There was some adjustment made.

Q. They finally came to an agreed proposition between landlord and tenant? A. Yes.

Q. You don't know whether those figures were the ones finally accepted or not? A. They were.

Q. Which one?

A. The Goodheart. I am not so sure about the Columbine.

Q. How big were those laundries?

A. Their total reproductive value was somewhat less than this laundry.

Q. Quite a little less?

A. About fifty per cent. Not quite fifty per cent each.

Q. Those are all the experiences you have had in connection with that after your first advent into the ap-
[fol. 891] praisal of laundries in the City of Omaha?

A. Yes, but that experience, going back and taking the information I received as to cost of machinery and equipment, I checked back against this and I felt I had done a pretty good job on this one in regard to values.

Q. And it confirmed what you had in mind in the first instance with the Kimball Laundry Company—that is what you will say, isn't it? A. Yes.

Q. Of course, when you made this appraisal in 1942, you didn't know how hard the usage was going to be by the government of the property? You didn't know how many hours they were going to run it? You had no way of anticipating that? A. No, I didn't.

Q. You didn't have any way of anticipating what the damage of the building, to the structure, would be, or the use?

A. On the final figure I think I estimated it.

Q. At the time in 1942 you didn't know? A. No.

Q. Mr. Sholes, you have been rather of an antagonistic mind, have you not, to the Jacobbergers, really from the start, in connection with that, that you entered
[fol. 892] this thing with a little feeling, due to the fact that an effort was made by you to get together and divide the laundry up, the work to be done by the army throughout all the army laundries in Lincoln and Omaha?

Do you recall something about that, and you stated Al Jacobberger had busted up the plan?

A. I never made such a statement in my life.

Q. You never made such a statement? A. No.

Q. You never talked of it and never made any mention of it in any proceeding at any time that there was such a condition?

A. Not that I recall. I don't think I ever did.

Q. Do you have any knowledge of anything of that sort?

A. I know there was something going on between the laundries in attempting to contract for this work, but I wasn't interested in it whatever.

Q. That was before your time, or after?

A. Before what?

Q. At the time you started to get into the employ of the government?

A. That was long before I was in the government.

Q. It couldn't have been so very long?

A. I didn't go in the employ of the government until [fol. 893] February—really, in March, 1943.

Q. But you made this appraisal in 1942?

A. Yes, I made this appraisal for the government on a fee basis.

Q. That was just on a fee basis? A. Yes.

Q. You hadn't done any work for the government except the isolated job of the Kimball Laundry Company at that time?

A. Not in relation to war work. I have done some other appraisal at previous times.

Q. I am talking about this war emergency?

A. No, that was the first job I did in the war emergency.

Q. And then did you go into the regular employ of the government after that?

A. Yes, after I completed my work in New York, then Colonel Britton asked the Ohio National if they would release me and allow me to go on full time for

the government as an appraiser, and I went with them and stayed with them for about a year in that department, and then I went back to the Ohio National, and then Colonel Britton came to me again and I was asked to go into priority adjustments; that is, in connection with the war contracts department, and I was there a [fol. 894] year, and then I went back to the Ohio National, and then a Mr. Daniel asked me last October if I would take the supervision of the real estate section of the R. F. C., now the War Assets Corporation, and that is where I am now employed.

Q. Did you ever go down to Lincoln, Nebraska, in reference to this work, this laundry work, in connection with the Kimball Laundry Company, and attempt to work out any plan for the servicing of the army with laundries in this vicinity? A. No.

Q. The laundry was not taken over until November 21, 1942, November 21st or 22nd, 1942, isn't that right?

A. Yes.

Q. When did you make your appraisal?

A. In October. Completed it October 26th.

Q. And you had worked on it for how long previously?

A. Five or six weeks.

Q. And you did that in the laundry?

A. I did part of it in the laundry and part of it at home.

Q. Who did you have with you?

A. I did it all myself with the exception of getting the prices, did all the work of taking off the inventory. I [fol. 895] did that personally so that the record would be complete. I started in in one corner of the building and took the first machine, gave it a number for that floor; platted on the floor plan where it was located and I went down consecutively with machinery and numbers; then the movable and fixture type of equipment, I located that where it was on the floor and numbered that by letters on an index so that every piece of equipment could be checked in the laundry as to where it was at the time of

the appraisal, and then there were loose items that were listed as miscellaneous.

Q. Calling your attention to Government's Exhibit 19, is that such a list as you made, or is it a list that you made—did you make that list, or is that a copy of the list you made, and if it is, is that an accurate list?

A. That is a copy of the list. I haven't checked it to know whether it is accurate, but—yes, I think it is.

Q. Better go on through it, thumb it through, because I want to ask you a few questions about it.

Mr. Murphy: I object to that as unfair to the witness. There are some 594 items.

The Court: Sustained.

[fol. 896] A. It appears to be a copy of it.

Q. It is a government exhibit?

The Court: It is vouched for and here in evidence and part of the record in the case.

Q. There is no summary there of maintenance?

A. Only by floors, of the different types of items.

Q. I will ask you to read off, if you will, from that exhibit—I don't have a copy of it—if you will read off from that exhibit the designation on the top of the two columns of figures? A. Cost installed and present value.

Q. And "present value"—what do you mean by present value?

A. That was the depreciated value at the time of the appraisal.

Q. And that was when?

A. That was October, 1942, and I do not consider there was any marked difference between October and November.

Q. That is all right. Neither do we, but it doesn't bear a date. The point is that Exhibit 19 does not bear a date at the top. It says "Present Value."

A. Present value as of October 26, 1942.

Q. That is what you meant by that? A. Yes.

[fol. 897] Q. That is the column on the right-hand side?

A. Yes, extreme right.

Q. And the left-hand is what you consider the Cost Installed? A. Yes.

Q. What we are talking about, for the court and jury, is the Cost Installed, appearing on this side, is given in one column, and then the Present Value, in this one. We have made a summary of the figures on Exhibit 47, and for no other purpose than to have a summary of the exhibit, and not for the purpose of being bound thereby, but merely as a matter of mathematics, I will ask you if you will not check at your leisure, or as soon as you can, and see if the total on your exhibit on the right-hand column is $331,894.61, and the Present Value column, $208,540.05? I am merely offering that exhibit, not that we care to be bound by the figures, but for your convenience, and we have the adding machine slips to aid you, if you wish.

Mr. Murphy: Assuming that statement of counsel constitutes an offer of that exhibit, we object to it at this time for the reason no proper foundation has been laid. During the day I will try to check it.

[fol. 898] Mr. Hotz: I haven't offered it yet.

The Court: You haven't laid a foundation for it, either. You have had someone add it up. Call the witness and prove he has made a computation and it is correct, and here are the figures as disclosed. That is the way to do it.

Mr. Hotz: I want to give the witness a chance—

The Court: You can give the witness a chance if he has computed it, but if he hasn't, give him a chance to.

Mr. Hotz: Haven't you computed the figures on that?

Mr. Murphy: Not particularly, and I will be very happy to do it at recess, and if they are okeh—I am not questioning the exhibit, but I haven't had an opportunity to do so.

Q. In these various exhibits, such as Government's Exhibit 18, and some of the other exhibits, there has been a tendency on behalf of the government witnesses to sometimes put, for instance, water softeners and things

of that sort in power equipment, and then the list of laundry equipment and machinery would have some parts of installation that might properly be classified as power equipment by some, but in the final analysis, Mr. Sholes, all the figures are there? That is what I mean. In your [fol. 899] appraisal, you have given, no matter whether it might be listed in one exhibit as power plant, or in another exhibit as a part of the laundry machinery and equipment, the fact remains that in the sum total you have everything that is down there, in the sum total of your figures, is that right?

Mr. Murphy: Just a moment. Object to the first part of counsel's question as being improper cross-examination and constituting an argument rather than any question, the tendency of the witnesses, and so forth.

The Court: And it merely confuses the issue. The question is: Have you included in your figures, no matter how you have classified them, all of the property that was taken and used by the government?

A. Yes, sir.

The Court: That answers your question, doesn't it?

Q. You gave as your estimate of the value of the power plant $12,500.00, did you not?

A. The depreciated value.

Q. That is what you claim the power plant was worth as a fair figure in November, 1942, when it was taken over, is that right? A. That is right.

[fol. 900] Q. Will you please tell me what went into that power plant to make up the $12,500.00, as you saw it?

A. That takes in the boilers.

Q. The boilers?

A. Stokers, the steam pumps, the breeching and all auxiliary equipment, including the draft blower and so forth that went to make up the boiler unit. It did not include the ash hoist or steam flow meter. I am not sure on that steam flow meter, whether it is included or not.

Q. Handing you Kimball Laundry Exhibit 23, which is entitled "Value of Items of Power Equipment or Power Machinery Which Are Specifically Adapted for

the Operations of the Kimball Laundry Company as a Laundry and Dry Cleaning Establishment," will you please state which items among those listed on that Exhibit 23 are included elsewhere by you than under the heading of Power Equipment, or Power Machinery? Please tell us and read the entire item.

A. The boilers are included in power equipment.

Q. Just specify, if you will—say 225 horsepower, 300 horsepower boiler, and tell us which one?

A. 225 horsepower boiler, included; 300 horsepower boiler included; draft indicator included. I am not sure on the steam flow meter, whether I took it in the power [fol. 901] or left it in the building; forced draft installation; ash hopper.

Q. You didn't tell us about the forced draft installation. A. Included. Two stoker installations included.

Q. You don't know about the ash hopper?

A. I am not certain. I think I left that with the building.

Q. Two stoker installations? A. Included.

Q. Heat reclaimer?

A. Not included; cold water tank not included.

Q. Hot water tank? A. Not included.

Q. Hot water heater? A. Not included.

Q. Three 108" diameter water softeners?

A. Not included.

Q. Salt reclaimer? A. Not included.

Q. Brine circulating system? A. Not included.

Q. Two American Marsh steam pumps? A. Included.

Q. Those are included? A. Yes.

[fol. 902] Boiler blower fan?

A. Included. There is a question there. Do you mean the ventilating fan in the boiler?

Q. Yes. A. The ventilating fan is in the building.

Q. No, that is— A. —that is forced draft?

Q. Yes. A. That is included.

Q. I am not talking about the fans in the building. K. V. A. capacitor? A. Not included.

Q. Air compressor installation? A. Not included.

Q. That leaves, then, the items you have included, six in your power equipment? A. Yes.

Q. 225 horse power boiler; 300 horse power boiler; draft indicator; forced draft installation; two stoker installations; and two American Marsh steam pumps, and the blower fan?

A. That boiler blower fan, you have the forced draft installation up above, and the boiler blower fan—I don't know just what you refer to.

[fol. 903] We will find out definitely.

A. But, there was a fan down in there. If it is part of the boiler equipment it is included. If it was that other fan, a ventilating fan, it is in the building.

Q. In the forced draft installation, the two American Marsh steam pumps, and the boiler blower fan, those are one installation together. A. Then it is all included.

Q. That is what you have stated? A. Yes.

Q. You give for that a valuation of $12,500.00 for the whole business. A. Yes, sir, for the whole business.

Q. I will ask you if it isn't true, Mr. Sholes, as a matter of fact, that the 225 horsepower boiler, in November of 1942, installed and ready for use in the condition of repair that it was, was not worth $8921.25?

A. Not by a long shot.

Q. Not by a long shot—and what about the 300 horsepower boiler? A. Neither was it.

Q. It wasn't worth—

A. —it wasn't worth this amount, $12,145.00. The [fol. 904] boilers were approximately eighteen years old and I only estimated they had a continuing life of five years and I depreciated them down sixty per cent.

Q. Did you ever have occasion to check the amount of repairs and replacement and how much expense had been put in on the boiler in recent years to put it in first-class condition?

A. I saw some of the repair items that had been put on, but nevertheless, the boilers were gone, in spite of the repair. You couldn't anticipate definitely how long, but the general type of those high pressure boilers is

anywhere from eighteen to twenty-five years. They may run thirty. I have seen them go out in fifteen.

Q. You know, do you not, they held up under the excessive use by the army for three years, or more?

A. That is about what I anticipated they would do, in my $9000.00 allowance, and for fear they wouldn't I added a two per cent risk rate in my calculation of return, to just take care of something that couldn't be foreseen; that they might go out and have to be replaced.

Q. Do you know the amount of steam pressure that had been used on those boilers during all the time the government was using them? A. No.

[fol. 905] Q. You don't know that? A. No.

Q. Isn't it true that the forced draft installation had a fair value in 1942 of $1184.21?

A. I gave it a value of $794.36 at that date.

Q. I will ask you if it isn't true that the two stoker installations had a value of at least $2940.32, depreciated value in November of 1942?

A. I estimated their value at $1643.63, depreciation fifty per cent for use. They are short-lived articles.

Q. I will ask you to state whether or not it isn't true that you did not know that the two American Marsh steam pumps had a value of at least $700.00 on November, 1942?

A. No. I do not have those in here as a separate item in my figure. They are included, though, in heating and plumbing equipment, as a lump, but not as an individual item.

Q. That was the total $12,500.00? A. Yes.

Q. I will ask you this: Do you know anything about the cost of a new boiler in November, 1942, such as the 225 horse power and the 300 horsepower? A. Yes.

[fol. 906] What it cost to install them? A. Yes.

Q. Same style and same weight of steel used in their construction?

A. A boiler of that capacity and horse power, perhaps in design not exactly the same.

Q. What do you think it would be?

Mr. Murphy: Objected to as incompetent and immaterial what the cost new might have been. The witness testified he knows that and used it in his calculations, but the figure itself is immaterial.

The Court: Overruled.

A. Those particular boilers I estimate would cost new at that time about $20,000.00, the two boilers in the building.

Q. Isn't the life of a boiler and the equipment such as you have had there, governed by whether or not it has been kept in an excellent state of repair by cleaning out the scale and taking care of it and not at any time running the pressure beyond the limit of the boiler, the steam pressure?

A. Of course, the life depends upon the type of use and the quality of use and care.

Q. Where are the other items that you have excluded [fol. 907] from Exhibit 23? Where have you included them elsewhere? By that I mean the steam flow meter, the ash hopper, heat reclaimer, cold water tank of 10,000 gallon capacity, hot water tank of 10,000 gallon capacity, hot water heater, salt reclaimer, brine circulating system, the capacitor and the air compressor? Where are they?

A. They are included in the item I gave yesterday of $181,000.00.

Q. $181,000.00? A. Yes.

Q. That is all included in that? A. Yes.

Q. Did you not state yesterday that the machinery and equipment was $213,400.00?

A. Yes, machinery and equipment, $213,400.00. That is correct. I read the wrong line down here. That is the figure in which they are included.

Q. Maybe we could get the difference between the $181,000.00—

A. The $181,000.00 is the break-up of the $213,000.00 between different items that had taken different rates of depreciation.

Q. But that is all included in the $213,400.00? A. Yes.

[fol. 908] Q. Calling your attention to Government's

Exhibit 19, in that list, was anything that is on Kimball Laundry Company's Exhibit 23 included? A. I think not.

Q. I am sure if you will check you will find there is not. A. I think not.

Q. Then, of course, in your estimate of the building at $190,000.00, you excluded all of the items that are included on Exhibit 23—that is, Kimball Laundry Company's Exhibit 23—you had them either one place or another, but not in the building? A. Not in the building.

Q. We are all right on that? A. Yes.

Q. And your land was $17,600.00? A. Yes.

Q. When you went to look at this building from the standpoint of value in 1942, did you have in mind a cubic foot measurement for valuation?

A. That is what I had in mind when I first started, but I didn't proceed on that basis.

Q. What cubic feet had you?

A. I hadn't figured it because I found it wasn't necessary to approach it in that manner.

Q. Is that the ordinary manner you would approach [fol. 909] it as an appraiser of buildings?

A. Mostly I use the cubic foot.

Q. Just explain what a cubic foot basis is.

A. That is taking the enclosed area of the building and determining the specifications in relation to the type of construction and applying a cost per cubic foot for that type of construction, which is obtainable from experience and from engineering costs and statistics.

Q. Can you give it?

A. I didn't figure it that way, so I can't give it to you.

Q. Did you figure the cubic foot content of the building so that you could give it to us? A. No, I didn't.

Q. Did you figure square foot floor space in the building?

A. I have figured it, but I didn't use that on the basis of valuation.

Q. Did you figure out the number of tons of steel in the building? A. No, I did not.

Q. Did you figure out its adaptability for a laundry located in close to the downtown district convenient for commercial quick service to downtown hotels and large [fol. 910] users, clubs and places of that sort?

A. I did take that into consideration.

Q. You did? A. Yes.

Q. To what extent? How much did you add for that?

Mr. Murphy: Objected to as incompetent and immaterial; not a fair question to the witness.

The Court: Sustained.

Q. Did you take into consideration the location of the property in reference to the population of the city?

A. Certainly, you take in all those factors when you are appraising property.

Q. Did you take into consideration the amount of repairs and replacements and upkeep of that building that the Jacobbergers had actually put in it?

A. I took its physical condition as it was, which would reflect what had been done previously.

Q. You know Mr. Latenser, do you not? A. Yes, sir.

Q. Do you know John Latenser built the building?

A. Yes. I saw the plans and had the original cost from Mr. Latenser.

Q. You went down to his office and he disclosed to [fol. 911] you the amount of money that went into each part of the building? A. Yes.

Q. He gave you full access to it so that you had it and had a chance to see it? A. Yes.

Q. I will ask you, as a matter of fact, if the building, exclusive of the power plant and the other items you have just said were excluded, did not have a fair and reasonable reproduction value on November 21, 1942, of $280,348.00?

Mr. Murphy: Objected to as improper cross-examination and not a fair question, with the use of the coupled words "reproduction value." There is no such thing. It is reproduction cost. It is not fair to the witness.

Mr. Hotz: I will withdraw the whole question and will put it all over again.

Q. I will ask you, Mr. Witness, if it isn't a fact that that building down there had a fair and reasonable market value, as a laundry building, located in the position that it was, with the capacity it had, of at least $280,000.00, at that time? A. No.

[fol. 912] Q. I am speaking now of November, 1942?

A. Correct. Its market value as a building at that time, on comparative sales, would have been about 75c to $1.00 a square foot, as a building.

Q. 75c to $1.00 a square foot or cubic foot?

A. Square, which would include the land, the way the market prices were running in sales at that time. I haven't figured to see what that would bring in. In the value of comparative sales $60,000.00 for the building, not considering it as a laundry building, but just as a building for sale.

Q. A five-story building?

A. Yes. That is the same rate per square foot that the Union Pacific bought the Iten Building, a fire-proof constructed building, per square foot; and Brandeis bought the M. E. Smith Building and Ford bought the Ford Building at 11th and Douglas, which is a heavier constructed building than this, all fire-proof.

Q. Your idea, on that basis, is that the Kimball Laundry Company building was worth about $60,000.00?

A. No, I gave it greater value that that.

Q. But on the square foot basis, $60,000.00?

A. I said on the value of comparative sales.

[fol. 913] Q. What did you figure out on the square foot?

A. I didn't figure it on a square foot basis, as I told you before.

Q. Did you figure the number of square feet in the building?

A. Yes, I know the number of square feet in the building.

Q. How much?

A. The over-all is about 57,500—over-all area.

Q. Taking the highest figure, $1.00, would be $57,000.00? A. I said about $60,000.00.

Q. The M. E. Smith building you were talking about down there, as a matter of fact, you know, do you not, that that building was built in 1928, do you not?

A. I don't recall the date it was built.

Q. And you know, do you not, that that building stood on the market for at least ten years and couldn't be sold because of its inaccessibility for rail or truck?

Mr. Murphy: Objected to as incompetent and immaterial and not proper cross-examination, this witness not having testified on direct examination anything about any of these other buildings.

Mr. Hotz: He volunteered these statements.

The Court: Yes, but not as you are putting it now. [fol. 914] The proposition he volunteered was that square foot space market value was 75c to $1.00, and then he refers to all these different buildings as a basis for that statement. We are not appraising the M. E. Smith building. We are not interested in that at all.

Q. What rule did you use in arriving at your value of $190,000.00, if you did not use the cubic foot or square foot rule?

Mr. Murphy: Objected to as having already been asked and answered in detail.

The Court: Yes, he has stated to us in detail. If there is anything about any of the property where the rule does not apply, or where there is a better rule, we will inquire into that. Yesterday he spent several hours explaining how he arrived at his values, the elements which he took into consideration.

Mr. Hotz: I think that is all.

Redirect Examination of Lewis Sholes by Mr. Murphy:

Q. Did I understand that you appraised these other laundries you mentioned in answer to Mr. Hotz' question in the same manner and on the same basis as you did the Kimball Laundry? A. Yes.

[fol. 915] Q. And you know, do you not, that in at least some of those other laundries, the figure arrived at

as to them, in the same manner, was accepted by both parties and a lease agreed upon and entered into?

A. Yes, sir.

Recross-Examination of Lewis Sholes by Mr. Hotz:

Q. I don't believe you said that on all these other laundries, the other four, I think, all told, that leases had been entered into, to your personal knowledge, on the basis of your figures? That wasn't what you said?

A. No, I didn't say that. I said the leases were negotiated on my figures. I sat in on two or three and one instance we made a thousand dollars difference, and another one a little difference in settling, but they were approximately the same figure. That is on those that did go through. I don't know of any that haven't gone through.

Mr. Murphy: *At this time Petitioner rests.*

Mr. Hotz: Remember when we had Mr. Hillmer on the stand right at the beginning of the case? There were some exhibits, and on one exhibit you stated: "Have the witness compile such of those sheets that you desire [fol. 916] and bring them in as separate sheets."

The Court: Better go back and get the ruling. Suppose you find these exhibits for me and in the meantime see if you can get the record on the matter.

Mr. Hotz: It is Exhibit 6.

Mr. Hotz: May I reserve at this time a motion I want to read into the record and do it later? They have closed and I want to make a motion.

The Court: Have you it written up?

Mr. Hotz: No, I will read it into the record later.

Rebuttal Testimony of Kimball Laundry Company

Mr. Peter W. Dahlquist, produced and duly sworn as a witness on behalf of *Kimball Laundry Company*, testified in rebuttal as follows:

Direct Examination by Mr. Hotz:

Q. Please state your name. A. Peter W. Dahlquist.

Q. Where do you live? A. Chicago, Illinois.

Q. How old are you? A. 62.

Q. What is your business?

A. Connected with the American Laundry Machinery [fol. 917] Company as supervising engineer in construction and repairs and anything pertaining to the laundry equipment.

Q. How long have you been so engaged?

A. I have been in continual service with the American people since May 15, 1927.

Q. Have you had any special experience in connection with the installation of laundry machinery and equipment of the type and kind that are here in the Kimball Laundry Company? A. Yes, I have.

Q. Calling your attention to this Exhibit 21, you had something to do with getting up the valuations on that exhibit? A. I did.

Q. And you did that with Mr. Kinder, did you not?

A. Yes, sir.

Q. And you did that in November of 1945?

A. Correct.

Q. What experience have you had with government laundries and where?

A. During wartime we installed 27 bases, including all complete installations, supervision of certain machinery that our company set in. Also in checking up on performance of the machines to see they were prop- [fol. 918] erly taken care of in the field; also took care of and checked up on repairs. I worked on 27 bases throughout the middle states here and some equipment all over America, and some was partly American, but I was in all these 27 bases in the last four years.

Q. Where were some of the bases located, and when you say that, tell us a few of them, the larger ones that were comparable to the Kimball Laundry Company in size?

A. At Camp Harrison, Indiana, there is a big laundry. In fact, we doubled that laundry capacity in one year. I had supervision of mostly all the work at Camp Attebury, Indiana, one of the large plants. I didn't finish that, but I was in there. Burns City, I was in there. Goodyear Corporation plant and laundry, not quite as big as Kimball Laundry, but the same equipment, some seventy-five to eighty pieces, and a complete laundry. Remington Arms. That is in Illinois. Galesburg Mayo Hospital, completed that. The Kansas Ordnance Plant. Camp Phillips at Salina. I was there on repairs and check-up. Camp Gardner started that plant. Topeka General Hospital was burned down and when that was ready for installation, I was in there. Previous to that I checked up on equipment that was taken [fol. 919] out of there that our company took over. Then, in Oklahoma, there are two bases at Norman, one for the army and one for the hospital organization. Burns Flats in Clinton, Oklahoma, complete installation. McAllister, another installation there. At Chicashay Government Hospital, I was in there four times, partly on installation and partly on supervision. That is in Oklahoma. In Texas, Camp House. That is near Galesville, and a base at Galesville. Camp Fannin at Tyler, Long View Government Hospital. Midland Base Flying Field in Midland, Texas, considerable installation there. Hastings Ordnance Plant in Nebraska. I was in there three times on the first installation and then increased the plant later on for more capacity. And in Arkansas, Pinebluff, there was considerable equipment went in there. Battle Creek, Michigan, another government hospital. So, my work covered boundless work for the government, army, navy and chemical warfare.

Q. In practically all of those instances those were government owned laundries, weren't they?

A. Yes. Their specifications came from Washington for our original setup and we had to make some minor setup from those in order to accommodate the present [fol. 920] setup, but I supervised all the work that way.

Q. Are you familiar at this time, and have been for a number of years, with the value of machinery and equipment that has been installed in a building and in place and ready to go?

A. Yes. We had our own reconditioning plant in Chicago and I was in charge for a number of years.

Mr. Murphy: I object to the witness volunteering statements. He has answered the question long ago.

The Court: Sustained.

Q. Did you also have to do in your line of work with evaluating machinery that had been used and destroyed in part for any purpose? Is that part of your job?

A. Yes, sir.

Q. How recently have you done some of that work?

A. I had a fire insurance with the Lincoln Hand Laundry. That was destroyed partly by fire.

Q. Have you done a considerable amount of that type of work, too?

A. Yes. I have made estimates that have been accepted by both parties.

Mr. Murphy: I move to strike the last part of the [fol. 921] answer as not responsive and a voluntary statement.

The Court: Sustained.

Q. When you came here to work upon this laundry machinery and equipment of the Kimball Laundry Company in Omaha, Nebraska, you came here, did you not, at the request of the Jacobbergers? A. Yes, I did.

Mr. Murphy: Objected to as leading and suggestive.

The Court: It is probably leading to something else. It doesn't matter at whose request he came.

Q. How long were you here in the preparation of Exhibit 21?

Mr. Murphy: Objected to as no proper foundation laid. There is no testimony this witness took part in it or when, or anything of that sort.

Mr. Hotz: I think he did at the beginning. That is the first thing I did was to ask him if he had anything to do with the compilation of Exhibit 21.

The Court: It is a long time back. We won't take the time to read it back.

Q. Did you have anything to do with Exhibit 21, which you have in your hand, Kimball Laundry Company Exhibit 21? A. Yes.

Q. Tell us what part you took in that?

[fol. 922] A. Mr. Kinder, whom I mentioned, and I—

Mr. Murphy: Just a moment. Objected to as no proper foundation laid. I am looking forward to the body of this testimony.

The Court: So is the court and I assume that this is preliminary to something.

Mr. Murphy: Before counsel makes inquiry as to what the witness did, fix a time as to when it was done.

Q. When was it done? A. In November, 1945.

Q. What did you do? Tell us what you did when you came here to Omaha in connection with the Kimball Laundry Machinery and equipment?

Mr. Murphy: Objected to as not proper rebuttal testimony, this being part of their case in chief.

The Court: You will have to tell me what you propose to rebut before you spend any more time.

Mr. Hotz: I am leading up to the proposition that this witness went through the plant, took each piece of machinery—

The Court: What is the evidence you are rebutting? Whose testimony, or what is it?

Mr. Hotz: It is the testimony of the government witness that it cost $20,000.00 to repair this machinery. [fol. 923] I want to show that he went through and there is no testimony of this kind from Mr. Kinder or from this witness what it would cost to replace this machinery in operable condition.

The Court: Is that part of your case in chief?

Mr. Hotz: No, Your Honor. They had in their $20,000.00 as to what it would take and it is to rebut these valuations and these exhibits that were here, Government's Exhibit 18. You will recall that one of the things

that Mr. Crowder did, he said he took each one of these machines, cost so much for the parts and so much for the labor, and cost so much to do the job, and he put on the stand Mr. LaTurner and Mr. Newcom, and I want to rebut that testimony with this man.

The Court: That these men didn't take each item separately?

Mr. Hotz: No, that they did not take each item, but that the job could be done for what they said it could be done. We didn't know anything about that when we came into the lawsuit.

The Court: You propose to show by this man, to rebut the testimony of these other gentlemen, on the proposition that they could not perform what they said they would in the time they spent?

[fol. 924] Mr. Hotz: No, in the amounts they stated.

The Court: The amounts is a matter for you. That is your case.

Mr. Hotz: Your Honor, we had no knowledge at all until the defendant came into this case and introduced these people, that they were coming into this with anything but valuations of machinery, the valuations of machinery then and now. Then they come in with repairs and replacements—

The Court: I think you had better take some time and get the facts that you want to rebut. You can't open up your case in chief on another theory. You had the option and privilege of making your case on any theory you saw fit. You did and you rested. Now, the government has come in with their witnesses and they have proceeded along the lines they saw fit. If there is anything in the testimony of any of their witnesses that is improbable, or that you say was physically impossible, that is rebuttal testimony, but you will not be permitted to go back into the question of valuations again.

Mr. Hotz: Which I am not.

The Court: Let's go on with the question and we will

[fol. 925] see.

Mr. Hotz: Let me put a few questions and see.

Q. Did you at the time you came here go into the matter of the repairs necessary on the machinery, repairs of the parts that were missing, and the repairs that were necessary to bring the machinery and equipment in good working order? A. Yes, sir.

Q. Did you take each piece of machinery by itself?

A. I did.

Q. Did you go out to Fort Omaha at the time?

A. Yes, sir.

Q. And see what machinery and equipment was out there? A. Yes, sir.

Q. Under whose permission?

A. We contacted Captain Dudley and he made an appointment with the Commander of the Post to permit us to come in and see it.

Q. So that when you did the work you made your study of the repairs and replacements necessary on that machinery from not only what was at the plant, but also that which was in storage at Fort Omaha? A. Yes, sir.

Q. Did you make a sufficient and accurate enough survey so that you have the totals now that you can [fol. 926] give us what that was? I don't mean to give us the numbers, but to do that so that you can tell us about it? A. Yes, sir.

Q. Calling your attention to Government's Exhibit 18, did you see Government's Exhibit 18? A. Yes, sir.

Q. And went over that? A. Yes, sir.

Q. And studied that over carefully, did you?

A. Yes, sir.

Q. Item by item? A. Yes, sir.

Q. I will ask you to state whether or not in your opinion the figure that is there given $20,471.27, that that machinery and equipment could be placed in good operating condition for that sum of money?

Mr. Murphy: Just a moment. Objected to as incompetent, not proper rebuttal testimony, it appearing that the witness is referring to one of respondent's own ex-

hibits which was introduced by respondent as part of their case in chief, and all of this constitutes a part of the case in chief.

The Court: That will be sustained. Improper rebuttal testimony.

[fol. 927] Q. Can you give us a figure that you arrived at in connection with the amount of expense that it would take to place that machinery and equipment in a good state of repairs?

Mr. Murphy: Same objection to that question, and I ask that the objection be extended by the Reporter, as given to the last question preceding.

The Court: Sustained.

Mr. Hotz: To the extent that the question would indicate, I would like very much to have this witness give this testimony, even though it might be considered in the interest of justice to our clients to be a part of our main case.

Mr. Murphy: That is trying the case all over again.

The Court: We can't try cases that way. We have been here two weeks now, and if I open up the case again it will mean about two weeks more. We have to proceed in accordance with the rules of orderly procedure.

Mr. Hotz: In connection with—

The Court: Suppose you wait and get your papers together. It is evident now you are going to have to have more time and if you need a little time to reconsider this, and if you have something to rebut, we want to give you a fair chance. You can't open up your case. [fol. 928] I won't permit it.

It is very evident, gentlemen, particularly you of the jury, that we can't conclude this case this afternoon, and I am well aware that you gentlemen from outstate have rented hotel rooms and that you have to give notice in advance or they will charge you another day's rental, and I am also informed that unless you give notice at noon you will have to pay them until tomorrow noon. Consequently, I am going to excuse you now and

give counsel a chance. We have many papers and many statements, and for your help and the help of the court, I want to give counsel on both sides an opportunity to get their papers in order for the rebuttal testimony, so that if there is something they should wish to clear up they may do so according to the rules: That takes time. You can not do those things in an hour and do them well, so I am going to give counsel an opportunity this afternoon to get these papers all in order. I will excuse you gentlemen to go home this afternoon and come back Monday. Be here at ten o'clock Monday morning, all of you, and we will then proceed to close the case. I feel we will save time by doing that. You will remember, [fol. 929] gentlemen, that I excused you last week end and gave you special instructions with reference to the manner in which you should govern your conduct during the week end. I am very happy to say that no intimation of any kind has come to the court or any officer of the court that your conduct has been anything but proper in every respect. Keep these instructions in mind and let us go on through to the end without any error in the record in so far as our conduct is concerned. Keeping this in mind, you will be excused now until ten o'clock Monday morning, the 18th.

March 18, 1946

MR. PETER W. DAHLQUIST, resumed the witness stand for further direct examination in rebuttal:

Direct Examination by Mr. Hotz (Continued):

Q. You are the gentleman who was on the stand Friday when we adjourned here in the courtroom?

A. Yes, sir.

Q. It was stated here on the witness stand by Mr. LaTurner and Mr. Newcom that the following sums of money expended on parts and labor would place the laundry machinery and equipment in good serviceable state of repair and in a good and efficient operating con- [fol. 930] dition, and also that a certain sum of money,

which they gave, would relocate some of the parts that had to be moved into their original positions. Mr. LaTurner and Mr. Newcom stated the total amount that they saw needed repairs and replacement and gave the amounts to be a total cost of parts delivered at Omaha, $5021.87; the total cost of labor to install parts and material, $3917.51, or a total of $8939.38. There was an item of $2729.35, that they testified would be required to place some of the machinery where it was originally, making a total of $11,668.73. Then, the government's witness, an army engineer, Mr. Crowder, stated that there would be some additional items that needed repair and the total was increased to $20,471.27. Those additional items, according to Mr. Crowder, are items over and above and additional to a list that had been furnished and stated by Mr. Newcom and Mr. LaTurner, and they gave in evidence Government's Exhibit 18, which stated thereon the grand total for restoration of all laundry and dry cleaning machinery and equipment items, $20,471.27; also they stated and included therein in that total figure, understand, that I gave you, they included $1750.40 for [fol. 931] cleaning and painting machines and fixtures and equipment; and then for what they term contingency, insurance, tools, social security and other items that would be expense in the operation of the restoration, $2020.37. Now, I will ask you if you have had an occasion to examine those figures that went to make up the $20,471.27? A. Yes.

Q. And you saw the exhibits to which I have referred? A. Yes.

Q. And the lists that were made up?

A. Yes, I saw them.

Q. And did you make up a list, an itemized list of each and all of the parts and machinery and equipment and check it with the figures that I have just given you given by the government's witnesses? A. Yes, I checked.

Q. I will ask you just how, generally, you made your check as to repairs and replacements and restoration

on each piece of machinery? How did you go about doing that? A. Originally?

Q. Yes?

A. Well, we started and checked each machine with our salesman here, Mr. Kinder, and if the machine was [fol. 932] in service, which a good many of them were, we stopped the machine and checked it thoroughly in regard to bearings and so on, and at the present rate at that time of labor, which is as high as it will be—

Mr. Murphy: Just a moment. The witness has answered the question and is now going off.

Mr. Hotz: That can go out.

Q. Tell how you did it?

A. We checked each machine individually and got what information to get it in first-class running order.

Q. I will ask you if you made a compilation of those figures? A. Yes.

Q. You understand what I am talking about so that there won't be any mistake about it, is that you made a compilation of the cost of the labor and parts to repair these machines in that plant, is that right?

A. That is right.

Q. And you did that in the last of 1945, is that right?

A. Yes.

Q. Did you also go to the machines that were outside of the plant at that time?

A. Yes, we found there were machines missing and [fol. 933] contacted Captain Dudley and he made request to the war department in Fort Omaha to get permission to see the machines, which we did.

Q. Then you went out to Fort Omaha and looked over the machines that were shown to you out there?

A. Yes.

Q. Did Mr. Kinder accompany you? A. Yes, sir.

Q. On your list did you take those into consideration as to what, if any, repairs were needed?

A. Yes, we did.

Q. In the event that repairs and replacements were put on these machines, either in the amount as I have

related to you by the government's witnesses, or in the amount that you found, would it place that machinery and equipment in the condition that it was in 1942? In other words, would the restoration, by virtue of the repairs and maintenance and labor, place that machinery in the same condition that it was in November of 1942, after three and one-half years, or approximately three years and a little over of usage?

Mr. Murphy: To which petitioner objects as incompetent and immaterial; not proper rebuttal testimony, being a part of respondent's case in chief; and for the [fol. 934] further reason that there is no claim those repairs would put this machinery in the same condition it was in 1942, the government's figures adding over and above that, at least, normal depreciation to a considerable extent; and for the further reason that the witness is not shown qualified to answer and there is no proper foundation laid, it appearing from the testimony of this witness that his business does not involve appraisals of repairs, but his supervising of installation, only, of new and used machinery, and that the only appraisal he ever made was in connection with a fire loss; and for the further reason that there is no foundation laid in that there is no showing that this witness at any time made any appraisal of machinery other than American Laundry Machinery items. I thought that first part of the objection was ruled on Friday.

The Court: Not exactly. The Kimball Laundry offered evidence on the proposition of damage, the value between the time of taking and the present time. The government proceeded along this line and offered evidence of what would be required to repair these machines. Now, this is the first opportunity that the Kimball Laun- [fol. 935] dry Company has had to go into that question. This man is going to testify that it cost more or less than the government's witnesses. That is proper rebuttal testimony, but he will not be permitted to go any farther than to show what his figures are. That is rebuttal testimony. He lays a foundation in that he is in

the service or employ of this American Laundry Machinery Company and that he, in that capacity, made an appraisal of the items of repair that would be necessary, and arrived at his figure. He is competent to do that. He is selling these repairs. But, to undertake to appraise the building or matters with which he is not familiar, that will not be permitted. Have I made myself clear? We will follow that line and you will not go any farther.

Mr. Murphy: Let's see what the question is. Let's make our record as we go along.

Mr. Murphy: I understand the court's ruling and I am not opposing that, but I don't believe that this particular question is proper rebuttal because I don't think it comes within the court's ruling. There is no testimony to be rebutted that these repairs would put it in the [fol. 936] same condition as it was in 1942.

Mr. Hotz: I will withdraw it, because he stated in the record that was not their purpose.

The Court: Withdraw your question and ask another.

Mr. Hotz: Very well.

Q. I will ask you this: You tell in your own language what amount of money it would take, according to your examination and estimation, to repair and place the laundry machinery and equipment in good running order. In doing that, Mr. Witness, be sure to explain to us what machinery and what equipment you are referring to and don't include anything else excepting that which you have personal knowledge of, of course, and in that regard, while you are doing that, I am going to hand you some papers that you gave to me which were used by you in that work, I presume.

Mr. Murphy: I object to that question in its present form for the reason it includes two or three questions and asks for an unlimited explanation and it is indefinite and uncertain.

The Court: Sustained. Let's ask a definite question. He made the appraisal. He appraised what and what figure did he arrive at?

Q. All right, Mr. Witness, what figure did you ar-
[fol. 937] rive at for the repairs of the laundry machinery and equipment at the Kimball Laundry Company, and where you found it out at Fort Omaha, as well?

Mr. Murphy: I object to that as incompetent and too indefinite and not distinguishing between boiler plant machinery and equipment and—

The Court: He will follow that with another question when he gives us his figure and we will find out what he included in that.

A. The figures I arrived at in parts was $21,086.00, and labor about $5175.30, and cleaning and placing machines in position where they were originally, with connecting, $1225.60. I made a mistake there.

The Court: Correct it.

A. Summary of all of the material and parts, including that which was not in service at this time, and these figures, on parts $11,543.95, labor $18,676.45, and reconnecting $4089.02; total $34,309.42.

Q. What does that include?

A. That includes American equipment that Kimball Laundry Company had bought from our company in previous years and that we were checking. It also includes foreign machines which I checked on also.

[fol. 938] The Court: You checked all of the laundry machinery and checked all of the power machinery, did you? A. Power machinery is, for instance—

The Court: I know what it is. The boilers. Did you check all of that?

A. Yes, all that pertains to the individual unit and repairs to it.

Q. In your estimate that you gave, did you include repairs to the boilers in the boiler room? A. No, sir.

Q. Did you include repairs to the condenser and water softener? A. No, sir.

Q. And the hot water heaters and reclaimers?

A. No, sir.

Q. What power machinery were you referring to? There are different kinds of power machinery in that laundry. Just explain again what you mean by power machinery?

A. I refer to each unit, whether it is washer, flat work ironer, or tumbler, or dry cleaning, that has its own motor drive in its own unit. That is power machinery.

Q. That is the power machinery you are talking about?

[fol. 939] A. That is right.

Q. On the laundry machinery and equipment?

A. That is right.

Q. From your experience in observing laundry machinery and equipment, such as you related Friday, has it been your experience, would you say, that when you saw this laundry machinery and equipment in November of 1945, that it showed any evidence of abnormal use, or was it such as you would find in any laundry that had been running and operating for a period of three years?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained.

Q. Would the expenditure of the amount of money you said, $34,309.42, restore that machinery and equipment in a condition of repair so that it would be virtually restored to a new condition, substantially so?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained.

Q. There was submitted a statement by Mr. LaTurner and Mr. Newcom, a compilation which was in the following figures: They stated on the witness stand here that the [fol. 940] total cost of parts delivered at the building would be $5021.87; the total cost of labor to install parts and make repairs $3917.51; or a total of $8939.38. That was just what Newcom and LaTurner testified to in connection with the American Laundry Machinery alone. Nothing else. Now, I want to ask you to state whether or

not in your opinion the American Laundry machinery alone could be repaired with the necessary parts and necessary labor for $8939.38?

Mr. Murphy: Objected to as incompetent and immaterial and not proper rebuttal testimony, and in so far as it is competent, it has already been asked of this witness and he has answered in his figures of what he thinks it would cost to repair it.

The Court: He didn't distinguish the parts that he is most familiar with in the business of selling. Objection overruled. What did the American parts cost, in your opinion?

Mr. Murphy: If the court please, I further object to it as not being a fair question, counsel having omitted one item from the figures of the government's witnesses and on an item which this witness is including in his figure.

[fol. 941] The Court: Then the foundation isn't proper.

Mr. Hotz: Might I ask counsel, with permission of the court, if you are referring to the cost of relocation?

Mr. Murphy: I am. Your witness has included that in his figures.

Q. Then, I will add that, Mr. Witness. I am referring to what was included on Government's Exhibit 12, and that was, Total Costs of Parts Delivered at Building, $5021.87; Total Costs of Labor to Install Parts and Make Repairs, $3917.51; and Total Costs to relocate in Original Position and Make Connections, and Ready for Operation, $2729.35, or $11,668.73. That was Newcom's and La-Turner's testimony on the American Laundry Machinery that was in there, and what my question is, is whether or not the job can be done for that sum of money?

The Court: In your opinion?

A. In my opinion, the parts—

Mr. Murphy: Just "yes" or "no," if the court please, is all that question asks for.

The Court: "Yes" or "no." He asked you if in your opinion it could be done for that figure.

A. For the figure quoted here?

Q. Yes?

[fol. 942] A. May I say this labor is—

Q. Just say "yes" or "no" first. This is just preliminary. Could it be done for that or not?

A. As long as I am not permitted to say, I will say no.

The Court: What is it you are not permitted to say?

A. The question of labor.

The Court: It is listed there.

A. Yes, but total rating—that is what counts.

The Court: What rating did you put on it?

A. We rated at that time the current labor of $1.85 an hour, plus expenses, which involves the coming in and doing the job. There is a loophole there, if I may say that. There is a big discrepancy there. The parts, if I may say, are very close.

The Court: In other words, you differ with these other witnesses on the cost of labor? A. Yes.

The Court: You think the costs more than they do?

A. I do.

The Court: That is all that is necessary on that.

Q. I want to ask you a question. When you gave the figure of $34,309.42, as the grand total, did you include in that anything in addition to the American Laundry machinery and equipment?

[fol. 943] A. Yes, there is one other unit that we checked over and that was a dry cleaning unit.

Q. That was included? A. That is right.

Q. In your business as supervising engineer for the American Laundry Machinery Company, did you also have to do with going into a plant that has been run down and needs repair and replacement, and going in and making your estimate for that work? That is a qualifying question and my attention has been called to the fact that I may not have asked you that? A. Yes, I do.

Q. That is part of your work? A. Yes.

Q. And has been for many years?

A. Since the early thirties, twenty-nine and thirties.

Cross-Examination of Peter W. Dahlquist by Mr. Murphy:

Q. You were here in November and went over this machinery with Mr. Kinder of your company, were you

not? A. Yes, sir.

Q. I mean, just last November?

[fol. 944] A. That is right.

Q. And you were here when this list, Respondent's Exhibit 21 was compiled, were you not? A. That is right.

Q. And you worked with Mr. Kinder on that? A. Yes.

Q. And you knew at that time, did you not, that 107 items that have been left blank in the right-hand column, as not being found, were, as a matter of fact out at Fort Omaha at that time? You knew that, didn't you?

A. All the machines at Fort Omaha we recorded on there and why they are not on there, there was no value we put on.

Q. If I were to tell you that this list furnished by Mr. Kinder omits entirely all of the items that were out at Fort Omaha and that Mr. Kinder testified on this witness stand that he didn't know where those things were—

Mr. Hotz: Just a minute. We object to that as not reflecting the record. I have Mr. Kinder's testimony right here.

Mr. Murphy: Let me finish my question.

Q. —then, that testimony was not true?

Mr. Hotz: Just a minute. I object to that as not reflect-

[fol. 945] ing the testimony of the witness Kinder.

The Court: Do you have his testimony there?

Mr. Hotz: Yes, we do Your Honor. This is in the cross-examination by Mr. Murphy:

"Q. Referring to the first page of the exhibit, items listed there are for the most part office furniture" and so forth, and

"Q. Had you seen it any time prior to November, 1945?

A. No.

Q. So, you don't know what happened to it in the meantime?

A. I only know the condition it was in when I saw it.

Q. There are, I think you stated—"

Mr. Murphy: I object to counsel reading all of this. This isn't pertinent to the question before the court.

Mr. Hotz: I thought it was and I still think it is.

The Court: Let me read it. Yes; he testified he spent a day out there and that most of the machinery was in a heap.

Mr. Murphy: I will take that up in the argument. There are a lot more items in here.

[fol. 946] The Court: Objection sustained. Ask another question if you wish.

Q. Did you have anything to do with compiling this list other than just checking the items with Mr. Kinder?

A. We made up that list as we went along from day to day. Later on it was priced at the current prices.

Q. I am asking you about the list. Did you know at that time there were some twelve or thirteen hundred items listed out here which had been purchased and paid for by the government, but which were charged to the government on this list, with the column to the left left entirely blank? A. That was never explained to me.

Q. You don't know whether it was explained to Mr. Kinder or not, I take it? A. I don't know.

Q. You haven't examined this list, I don't suppose, to check to see whether or not it is true that it omits in the right-hand column all of the items that were out at Fort Omaha at the time you and Mr. Kinder were here?

A. May I have it, please?

Q. It wasn't quite fair to you. I didn't hold it up [fol. 947] to you where you could see it. On this Exhibit 21, turn over a few pages. A. Yes.

Q. And you will note many items? A. That is right.

Q. For which no credit is given the government in the column at the extreme right? Do you understand what I mean? A. Yes.

Q. And note, as I turn over there, there are a number of them. Did you know where those items were when you and Mr. Kinder made this survey, those items that are omitted from this list? A. We—

Q. I am asking you if you knew where they were at that time? A. I didn't see them.

Q. But you now think you checked everything at Fort Omaha, is that right?

A. Everything that we could find there we checked.

Q. Coming down to your testimony this morning, did you check Government's Exhibit 18 in making these estimates you have testified to here this morning? This is the list compiled showing all of these items showing the total Mr. Hotz asked you about of $20,471.27. Isn't this [fol. 948] the list of articles that you checked in your figures to get your cost of repair?

A. The list we got we followed all the way through.

Q. I will eliminate any question as to just what is included in your figures and I want to know whether it is this list, or whether it is some other list? Do you know whether the list you checked is this list in Government's Exhibit 18?

Mr. Hotz: Just a minute. I object to that as a little unfair with the witness, and for the further reason I call the court's attention to the fact that the items on the Exhibit 21 of Kimball Laundry Company and the items on the Exhibit 18 are the same and have been admitted to being the same.

The Court: Overruled. They are not the same. One doesn't have all the items the other has. That is what he is inquiring about. Proceed.

Q. Did you understand me? I am merely trying to find out definitely just what list of items you checked and have included in the figures regarding which you have testified this morning. Did you have some list before you when you were making up that check? A. Yes, sir.

[fol. 949] Q. Do you know what list it was?

A. Well, as far as the numbers go it is corresponding with these we made here.

Q. That is this Exhiibt 21, of which that is a photostatic copy. I might state to you that is Mr. Kinder's original list. A. Yes.

Q. Did you include everything in that list in your figures this morning? A. Yes.

Q. In getting those figures of yours, as I understand you, there is little difference between you on the one hand, and Mr. LaTurner and Mr. Newcom on the other, as to cost of parts, is that correct? A. Yes.

Q. And that the chief difference between your figure of thirty-four thousand dollars, and Mr. Crowder's figure of twenty thousand some dollars, is chargeable mostly to a difference in figures on labor costs?

A. That is right.

Q. I will ask you if it isn't a fact that you charged $2.85 per hour for all labor throughout on your figures making up your thirty-four thousand total?

A. That figure was the overhead charge for men from [fol. 950] our company.

Q. $2.85 an hour?

A. That is including on straight time, eight-hour day, including what you would say is living expense, being away from home.

Q. I am not asking about what all you include. I am asking you if you didn't figure in your computation $2.85 per hour straight pay for the men doing that work?

A. That is right.

Q. And you even charged $2.85 per hour for work of a common laborer of carrying a piece of machinery from one place to another? A. That wasn't included.

Q. Aren't these some of your figures?

A. In figuring this,—

The Court: Answer the question. Are those your figures? A. I will say, yes.

Q. That shows a straight charge of $2.85 per hour for all of the labor, isn't that correct? A. Well, yes, I will say that.

Mr. Murphy: That is all.

Redirect Examination of Peter W. Dahlquist by Mr. Hotz:

Q. Is that the prevailing rate and the prevailing charge [fol. 951] for that kind of work?

Mr. Murphy: Wait a moment. Objected to as not proper redirect examination, I think, and indefinite and uncertain when he says "that kind of work."

Mr. Hotz: I mean the kind of work—

The Court: It is not proper redirect examination, as I see it. Sustained.

Q. Does all the work which you saw that was necessary to be done down there require skilled work, or is any of it common labor?

A. I will say it is. At that time you had to pay the prevailing rate whether he was carrying a bolt around, or working as an electrician or a first-class machinist.

Mr. Murphy: Just a moment. Move to strike the answer as not responsive.

The Court: Sustained.

Q. Do you have in your possession the notes from whence your testimony was derived on each one of the machines and the labor and material and costs? A. Yes.

Q. And the summary is attached to each one of the pages? A. That is right. The grand summary is right here of all parts, labor and reconnecting.

Q. Are those in your own handwriting?

[fol. 952] A. Yes.

Mr. Hotz: We offer in evidence Kimball Laundry Exhibits 48, 49 and 50, being the summaries and tabulations which the witness had in his hand at the time he was testifying.

Kimball Laundry Exhibit 48, found in Volume III, at Page 1089.

Kimball Laundry Exhibit 49, found in Volume III, at Page 1090.

Kimball Laundry Exhibit 50, found in Volume III, at Page 1091.

[fol. Vol. III, pp. 1089, 1090-1] D. EX. 48, 49 and 50 (Received)

Exhibits 48, 49, and 50 are many pages of the itemization of the cost of reproduction, repair, and replacement of the machinery and equipment in the Kimball Laundry Company by the witness Dahlquist. The items identified from the same item numbers listed on the left side and used by both parties in the presentation of the case. The description of the machine is given, the number of man hours estimated to do the work, and the cost of the parts and labor. This is itemized throughout the plant. Each item is given by number, followed by the cost of

the parts, the labor, and the cost of reconnecting items that need reconnection. A summary is then given on p. 2 of Exhibit 49:

Summary of parts	$11,543.95
Summary of labor	18,676.45
Summary of reconnecting	4,089.02
Total	$34,309.42

[fol. 953] MR. G. A. STEINHEIMER, produced and duly sworn as a witness on behalf of the *Kimball Laundry Company*, testified in rebuttal as follows:

Direct Examination by Mr. Hotz:

Q. Please state your name? A. G. A. Steinheimer.

Q. Where do you reside?

A. 539 South 52nd Street, Omaha.

Q. And you have lived in Omaha how long?

A. Thirty-one years.

Q. What is your business? A. Painting contractor.

Q. How long have you been such? A. Thirty-one years.

Q. Here in the city of Omaha during that period of time? A. Yes, sir.

Q. Some of the work you have done in this city and are doing now include what?

A. The work at Boys Town; additions to Mercy Hospital and St. Catherine's Hospital; worked for Swift & Company; Insurance Building at the present time, besides other work we have done in the past. If you want that: Fontenelle Hotel, Farm Credit Building; Masonic Temple; churches all over Omaha— St. Mar-
[fol. 954] garet Mary's, Saint Bernard's, First Methodist; Nebraska Power Building; M. E. Smith Building; Herzberg's Store; Carman's; Goldstein-Chapman's; this Post Office Building; Court House.

Q. Are you familiar with the cost of the labor, material and other elements that enter into a painting job such as would be required at the Kimball Laundry Company? A. Yes, sir.

Q. Did you ever do any work for the Kimball Laundry Company? A. Yes, sir.

Q. When did you do that? Some years ago?

A. Some years ago, I couldn't recall at this time.

Q. There was a witness on this stand by the name of Mr. Rorick, a general contractor. Do you know Mr. Rorick? A. I do.

Q. There was also a witness on this stand, a Government's witness, a Mr. Alexander, who is connected with the Engineer Corps of the United States Army Engineers. Do you know Mr. Alexander? A. I don't believe I do.

Q. Did you ever talk to him upon the phone about a [fol. 955] painting job? A. I don't recall.

Q. I will ask you this question: Mr. Rorick testified that he had a conversation with you, or a transaction with you, in which you agreed to paint the Kimball Laundry Company and do the job for $5970.00, I believe, is that right? A. $5997.00, I think, to be correct.

Q. He stated in his testimony that that included two coats of paint. I will ask you what the facts are in connection with that, whether or not you told him it was two coats of paint or more than two coats of paint, or just what was the situation, and if there was anything in writing in connection with it?

The Court: Why don't you say, two coats of white lead and oil?

A. May I state I called at Rorick's office to get a blue print of the Kimball Laundry; I mean five prints of the first, second, third, fourth and fifth floors. On this blue print were notations of what they wanted done and the specifications, so to speak, were written on there; also a tabulation of someone's quantity survey was taken off and written on the plans right on the first sheet of the plans—I believe on the back of it; however, the specifications called for one coat of lead and oil on [fol. 956] everything and it went on to list the items that were there in an apparent quantity survey. Having the print there and having this quantity survey, I just

took a square rule and checked out one of two floors and they didn't seem to correspond with the quantity survey, so I took these plans and went over to the Kimball Laundry and remeasured some of the areas and from that I gave them a bid of $5997.00 to do one coat on the areas mentioned on this blue print.

Q. Did you put that in writing? A. Yes, sir.

Q. Do you have a copy of that? A. Yes, sir.

Q. Will you produce it? Calling your attention now to Kimball Laundry Exhibit 51, dated March 1, 1946; I will ask you to state if that was a copy of the letter you wrote and delivered to Mr. Rorick? A. That is correct.

Mr. Hotz: We offer that in evidence.

Mr. Murphy: The Government objects to this as incompetent and immaterial and not proper rebuttal testimony, not rebutting in any way whatsoever, Mr. Alexander having been recalled and testified that they discovered the misunderstanding or error and that those [fol. 957] figures were for one coat of white lead and oil and gave the two coat figure and increased it on the exhibit.

Mr. Hotz: I have no recollection of any such statement. He stated he relied upon the general contractor.

The Court: If he has stated it, then this merely corroborates the fact. Let's not take the time to go back. Mr. Murphy said they discovered this and corrected it, and here is the best evidence. Here is the bid itself.

Q. We asked Mr. Alexander on the witness stand if he would go to you that noon and obtain some additional figures and some additional data in reference to the kind and style of painting, the number of coats, and I will ask you if they did come to you while this case was on trial and stated that the case was going on and wanted you to give another bid in writing that would include the two coats of paint of a different style that would include gloss finish?

Mr. Murphy: Objected to as incompetent and immaterial and not proper rebuttal testimony and not rebutting anything.

The Court: Sustained.

Kimball Laundry Exhibit No. 51, appearing in Volume III, at page 1092.

[fol. 1092] D. EX. 51 (Received)

3810 Farnam Street

Rorick Construction Company,
Omaha, Nebraska. March 1, 1946.

Dear Sirs:

We propose to furnish all Labor, Materials, Workmen's Compensation, Public Liability and Property Damage Insurance required to do the painting in connection with the Kimball Laundry Building, according to plans and instructions prepared by the U. S. Army Engineers, for the sum of $5997.35.

All work to be performed in a first class manner in all respects.

Very truly yours,
G. A. Steinheimer Company
By G. A. Steinheimer.

[fol. 958] Q. Did you make a survey, and can you tell us what it would cost to make a two-coat job and do the work as you think it should be done, seeing the conditions down there, including the cost of a gloss or semigloss finish?

Mr. Murphy: Objected to as incompetent and not proper rebuttal testimony, they having gone into that exact thing with another painter in their case in chief. They have in the record a bid.

The Court: What record?

Mr. Murphy: Of the cost of a paint job.

The Court: If that is all, it isn't proper rebuttal testimony.

Mr. Hotz: Mr. Alexander had stated it would cost twenty per cent additional and he added some additional costs.

Q. I am calling your attention to Government's Exhibit 17 and I will read from it, because it is an esti-

mate made by the United States Engineers of the following items for repairing that building for $8389.00, and it includes painting, and I am going to ask you whether or not in your opinion that job can be done for $8389.00 for the painting, alone, without the rest of the stuff.

Mr. Murphy: Objected to as not proper rebuttal in [fol. 959] view of their own testimony in their case in chief.

The Court: Sustained.

Q. One of the items, then, is: Interior painting throughout, two coats lead and oil, 1st to 5th floors, all surfaces presently painted, approximately 12,200 sq. yds. surface. Includes cleaning woodwork in offices and varnishing, removing paint scale and patch plastering in stair wells, reputtying steel sash where required other than noted above, and repainting storm sash for east windows 2nd floor. I will ask you if you are prepared to testify here what that would cost in your estimation.

Mr. Murphy: Same objection.

The Court: Same ruling. Sustained.

Q. Calling your attention to Government's Exhibits 13, 14 and 15, which are some exhibits placed in the record by the Government from a man named Otto Schaap, a painting contractor, I will ask you to look those over, and especially calling your attention to the larger sheet, I think it is Exhibit 15, as a painting contractor, do you see anything that is obviously wrong right on the face of it with that bid or statement in connection with this paint job?

Mr. Murphy: Objected to as not proper rebuttal for [fol. 960] the same reason.

The Court: Sustained

Q. I will ask you to state whether or not in your opinion the work outlined in there could be done in a proper manner for that sum of money, in your estimation, and do the job properly?

Mr. Murphy: Same objection.

The Court: Sustained.

Q. I will ask you if you have made an estimate of the cost to do that job down there, of painting, with two coats and giving it both ways, whether or not it would require gloss paint? Have you done that?

A. Yes, sir.

Q. Do you have that in your pocket with you readily?

A. I do.

Q. May I see the bill? I will ask you to state whether or not this is a copy of the estimate that you made for the Rorick Construction Company and submitted to him on March 9, 1946?

A. It is.

Q. How did that come about? How did you come to deliver that to Mr. Rorick of the Rorick Construction Company? When and under what conditions?

Mr. Murphy: Objected to as incompetent; not proper rebuttal testimony; dealing again with the general bid, [fol. 961] a part of their case in chief.

The Court: Sustained. You are examining on a matter you went into in your case in chief. You are now at rebuttal. You have had your day.

Mr. Hotz: I am rebutting a government's witness.

The Court: It is sustained.

Mr. Hotz: Counsel hasn't even seen what I have here.

The Court: It doesn't matter. It is sustained.

Mr. Hotz: Is there any objection to the fact that this is not the original letter?

Mr. Murphy: No.

Mr. Hotz: We offer that in evidence.

Mr. Murphy: We object to the offer of the exhibit for the same reason as to the question.

The Court: Sustained.

Q. I will ask you to state whether or not you made a bid to the Kimball Laundry Company, as such, based upon the same figures that you had given to Mr. Rorick?

A. We gave them a copy of the letter to Mr. Rorick.

Q. You made the same to both?

A. Yes, it is just a carbon copy.

Mr. Hotz: Now, we ask that Exhibit No. 52, with that explanation—

[fol. 962] The Court: That does not change the rule. You know that. That is not rebuttal testimony. You have been over that field. You have to put an end to this case sometime.

Mr. Hotz: We will. That is all.

Kimball Laundry Exhibit No. 52, found in Volume III, at page 1093.

[fol. 1093] D. EX. 52 (Refused)

The Rorick Construction Co.
Omaha, Nebraska March 9, 1946

Dear Sirs:

We propose to furnish all labor, materials, workmen's compensation, public liability and property damage insurance required to do the painting in connection with the Kimball Laundry building according to the following specifications, for the sum of $17,281.

The exterior of all metal windows to be brushed and scraped, given one coat of red lead and one coat of lead and oil paint in color selected.

Throughout the interior from the first to the fifth floor inclusive, all walls, ceilings, columns, elevator enclosures, exposed and covered pipes, sprinkler pipes, metal work in connection with the package conveyor will be washed, given one coat of undercoat and one coat of semi-gloss paint.

All wood and metal work in connection with these areas will be scraped, cleaned, and given two coats of lead and oil paint. The metal sash will have all loose putty removed and replaced.

Throughout the office portion the walls and ceilings will be washed and given two coats of flat wall paint. In two offices the walls will be hung with imitation wood paper. The varnished woodwork throughout these areas will be washed, touched up with stain and shellac where necessary, and given one coat of best grade varnish.

The iron work in connection with the stairs will be painted same as called for on the other metal work.

In the toilet rooms, where cement floors have been previously painted, same will be given two coats of best grade cement floor paint.

All work to be performed in a first-class manner, done at such times as directed by the owners.

Yours very truly,
G. A. STEINHEIMER COMPANY
By /s/ G. A. Steinheimer

Cross-Examination of G. A. Steinheimer by Mr. Murphy:

Q. The fact is, is it not, that in your original letter of March 1st to Mr. Rorick, Respondent's Exhibit 51, you did not happen to state specifically whether it was one or two coats?

A. Yes, but then I would like to explain that.

Q. I will let you explain. You were given what you understood were for the specifications? A. Yes.

Q. And you understood those specifications to call for certain cleaning and washing and one coat of white lead and oil paint? A. Yes.

Q. And that is what you made this bid upon?

A. That is right.

Q. You did, then, state in writing to Mr. Rorick that you would clean and wash certain areas of the building? [fol. 963] A. That is right.

Q. And apply one coat of white lead paint for a total cost of $5997.35? A. Yes, sir.

Q. And that was your bid on that basis?

A. That is right.

Redirect Examination of G. A. Steinheimer by Mr. Hotz:

Q. Mr. Rorick came back and asked you to correct your bid, having two coats, and with the additional things that are contained in the letter that you wrote to him dated March 9, 1946? A. That is right.

Mr. Murphy: Objected to as having been gone over.

The Court: Mr. Hotz, you know that that is not

proper. I have shut this out. I have rules and I expect you to submit to the ruling.

Mr. Hotz: I will do it, Your Honor.

The Court: Don't make any mistake about it.

Mr. Hotz: That is all, Mr. Steinheimer.

MR. PETER KIEWIT, produced as a witness on behalf of *Kimball Laundry Company,* being duly sworn, testified in rebuttal as follows:

Direct Examination by Mr. Hotz:

Q. Please state your name? A. Peter Kiewit.

Q. Where do you reside? A. Omaha, Nebraska.

Q. How long have you resided here?

A. I was born here.

Q. What is your business?

A. In the contracting business.

Q. How long have you been so engaged?

A. More than twenty-five years.

Q. Do you confine your activities to building buildings, largely construction work?

A. Well, I wouldn't say we limit it to building buildings. We limit it entirely to general construction.

Mr. Murphy: May I suggest, to save time, we are perfectly willing to concede that, Mr. Hotz.

Mr. Hotz: I want to qualify him.

Mr. Murphy: We will admit his qualifications.

Q. What is some of the work you have done here in the city of Omaha and in this vicinity in recent years? [fol. 965] A. We built the Union Station; the Stockyards office building in South Omaha; the Joslyn Memorial building; North High School; Benson High School, downtown office buildings like the Metropolitan Utilities building; Union State Bank building. During the war we built the Martin Bomber Plant at Fort Crook, and have done some other building work in Omaha. We built the Kimball Laundry, also. That wasn't recently, but we did build it.

Q. You are familiar, then, with the cost of construction of buildings and labor costs at the present time in the city of Omaha, I suppose?

A. I believe we are, yes, sir.

Q. And in your work that you do, do you occasionally do work such as restoring buildings and fixing them up, repairing them and replacing them? A. Yes, sir.

Q. That is part of your work as a contractor?

A. Yes, sir.

Q. Have you kept in touch with the Kimball Laundry Company building in the past years; that is, have you had opportunity to go down there and so forth?

A. Well, I hadn't been in the building since the war started until last week. I had been in the building many times in the years previous to the war after we had [fol. 966] completed the building. We had gone down there time after time to make minor changes.

Q. Have you recently made a survey of that building to determine its state of repair and the necessary cost and expense to put it in a proper state of repair so far as the building is concerned?

A. I was through the building three different times last week.

Q. Did you have someone with you?

A. Yes, I had some of our engineers with me.

A. To what extent did you go through it?

A. Well, I personally went from the roof to the basement three or four times and walked any place it is convenient to walk.

Q. Did you furnish the Kimball Laundry Company with an estimate of what it would cost to place the building in a good state of repair as you observed the necessary things to be done?

A. We prepared a proposal based upon putting the building in first-class condition, yes, sir.

Q. And you have just been able to complete that very recently, isn't that true?

Mr. Murphy: Objected to as incompetent and immaterial, the witness having testified when he did it.

[fol. 967] The Court: Sustained.

Q. Calling your attention to Exhibit 53, I will ask

you to state if that is the instrument concerning which you have just been testifying? A. Yes, sir.

Mr. Hotz: We offer that in evidence, if Your Honor please.

Mr. Murphy: To which the Petitioner objects as incompetent and immaterial and not proper rebuttal testimony, the Respondents in their case in chief having presented evidence in detail on both the value of the building and cost of repairs to that building.

The Court: I think there was a little difference on the basis of your measurement of the loss or damage down there between the Government and the laundry. They proceeded on the theory of the value at the time of taking and you come then with special experts to prove what it would cost to restore the building and put it in a first-class condition, and on that theory this is the first opportunity they have had. They had rested their case before you disclosed your method and I am going to permit it.

Mr. Murphy: May I say a word in explanation, if [fol. 968] the court please. That is true as to the machinery and the boiler equipment and that is why I didn't particularly press my objection on those items, because the court explained the ruling there, but in their case in chief on the building they went into detail as to the cost of repair and restoration.

The Court: Can you find that record for me?

Mr. Murphy: $35,000.00. Both Mr. Harry and Mr. A. L. Jacobberger mentioned the amount and they had numerous items.

The Court: Find the testimony for me, please.

Mr. Hotz: It was Harry Jacobberger's testimony and it was right near the end.

Mr. Murphy: Their figure of $220,000.00 was made up with the difference in value on the two items and $35,000.00 cost of repair on this item.

The Court: You went into the matter with Mr. A. L. Jacobberger definitely and distinctly. Objection will be sustained.

Mr. Hotz: What I had in mind is not here. It was the supporting testimony. They were giving generalizations and Harry Jacobberger especially said he had some bids from a few people and I asked if he had the other bids yet prepared and he said they were in the process of preparation.

[fol. 969] Mr. Murphy: There is no such testimony.

Mr. Hotz: It is specifically there and there is no doubt about it and I asked him if he would bring it in. A. L. Jacobberger testified in connection with the building, if Your Honor please. Al said, "That is Harry's. Harry is looking after that." He said, "I am not looking after that," and then we had Harry on the stand and he gave this thing.

The Court: I am asking you to get the record. I have read A. L. Jacobberger's testimony. I know what he testified to. Then you say you asked the privilege of presenting these estimates at a later date. Find the record.

Mr. Hotz: I will have to ask the Court Reporter to get it.

(Noon recess.)

Offer, objection read.

The Court: Objection sustained.

Q. Calling your attention to Exhibit 53, to this item on page 2 of "22", and ask you if that is not a typographical error? If it shouldn't be 2200 instead of 22?

A. Yes, sir.

Q. And that should be changed from 22 to 2200?

[fol. 970] A. Yes, sir.

Q. Does it change the total footings?

A. No, the total is right.

Mr. Hotz: May I make that correction?

Mr. Murphy: No objection.

Mr. Hotz: I would like the Court Reporter to read the portion of Mr. Jacobberger's testimony there about getting his bids in.

The Court: I read it.

Mr. Hotz: He said he would try to get them in before the end of the week if he could.

The Court: I read it and I know what it is.

Mr. Hotz: In reference to Exhibit 53, it is likewise offered as having been identified by the witness Mr. Peter Kiewit, president of Peter Kiewit Sons, and offer it as a part of the examination of Mr. Harry Jacobberger, in support of his testimony in reference to the structural repairs on the building, and ask the court for permission to do that in furtherance of justice in this case.

The Court: You were cautioned just before you rested your case that that was the time to introduce your evidence. Overruled.

Mr. Hotz: That is all, Mr. Witness.

[fol. 971] Kimball Laundry Exhibit 53, found in Volume III, at Page 1094.

[fol. 1094-1] D. EX. 53 (Refused)

PETER KIEWIT SONS' CO.

CONTRACTORS

Established 1884

Office 1024 Omaha National Bank Building

Omaha, 2, Nebr.

March 12, 1946

Kimball Laundry
311 South 15th St.
Omaha, Nebraska
Attention: Mr. Harry Jacobberger
Gentlemen:

We submit herewith our proposal for furnishing all labor and material required to put the Kimball Laundry Building into first-class condition.

This bid includes the items listed below and is qualified to the extent that it is based upon today's labor and material prices and does not include the following:

1. No painting.
2. No work in connection with elevator doors.
3. No work in connection with elevator machinery or mechanism.
4. Nothing for hot and cold water piping which needs replacement.

5. Nothing for pipe covering.
6. Nothing for electrical equipment or wiring.
7. Nothing for plumbing.
8. Nothing for heating.
9. Nothing for moving of equipment to perform our work.

Work in Connection with Roof—	
Replace 8" Tile Wall Coping	$ 28.00
Rebuild 75' of Stack	2,375.00
Restucco Walls above Roof Line	467.00
[fol. 1094-2] Kimball Laundry—3/12/46—Page Two	
Replace Terra Cotta Coping	$ 660.00
Caulking of Coping	165.00
New Gutters and Downspouts	180.00
Recoat and Regravel Roof and Replace Flashing as necessary	545.00
Work on Fifth Floor—	
Replace 12" x 18" Wire Glass	117.00
Remove and Reset 12" x 18" Wire Glass	23.00
Replace 16" x 18" DS Glass	143.00
Remove and Reset 16" x 18" DS Glass	113.00
Remove and Replace Terrazzo Floor	3,150.00
Remove and Replace Cement Floor	158.00
Remove and Restucco Walls at Water Tank	80.00
Remove and Replace Glazed Tile Wall Surface	281.00
Remove and Replace Base of Glazed Tile Wall	150.00
Remove and Replace Curb at Chute	25.00
Work on Fourth, Third and Second Floors—	
Remove and Reset 14" x 18" DS Glass	199.00
Replace 14" x 18" DS Glass	225.00
Replace 18" x 22" DS Glass	25.00
Remove and Reset 18" x 22" DS Glass	45.00
Repair Toilet Partitions	125.00
New Kalamine Door and Frame	125.00
New Hollow Metal Sash	570.00
Remove and Replace Fire Escape Railing	1,350.00
Work to Be Done on First Floor—	
Remove and Replace Wood Flooring over Water Softener	69.00

Remove and Replace Concrete Floor	1,040.00
Adjust Doors to Shop	10.00
New Floor Topping in Shop	21.00
Cement Sill on Transformer Room Ledge	21.00
Repair Lockers in Transformer Room	20.00
Repair Asphalt Tile Floor	25.00
Re-wallpaper Office	80.00
Repair Acoustic Ceiling	40.00
Remove and Replace Terrazzo Floor in Lobby	432.00
Work Required in Basement—	
Remove and/or Replace Safety Treads on Stairs	108.00
Remove and Replace a Portion of Cement Floor	160.00
Gunite Walls of Boiler Room 6' High	990.00
New Hardwood Floor in Elevator	50.00
Work To Be Done on All Floors—	
Patch Plaster and Cement Work before Painting	2,200.00
Caulk all Window and Door Openings on Exterior of Building	420.00

[fol. 1094-3] Kimball Laundry—3/12/46—Page Three

Miscellaneous Items to be Done—	
Patch Bumper Curb in Alley	$ 10.00
Repointing of Brickwork	1,650.00
New Window Sills in Alley Wall	42.00
New Coal Chute Door	10.00
New Sash in Alley Wall	65.00
Broken Glass to be Replaced in First Floor	23.00
Straighten Window Guards	5.00
Replace broken stone base on outside of building	1,300.00
Remove and Replace Broken Terra Cotta Trim	3,300.00
New Steel Sash in Fifteenth Street Wall	80.00
Remove and Reset Curb Stone	450.00
Remove and Replace Sidewalk Door	275.00
Point up Brickwork in Areaway	75.00
Remove and Replace Concrete Sidewalk	2,089.00
Replace Inside Floor Gutters	2,200.00

Remove and Replace Floor and Gutter Mastic	8,777.00
New Door Frame to Pump Room	85.00
New Fire Escape Doors	400.00
New Oak Shelving in Main Office—Routeman Room	375.00
Brick-up Opening in the Above Room	27.00
Reset Steel Shelving in Call Room	110.00
Repair or Replace Operators on Overhead Doors	650.00
Replace Eight Storage Bins in Basement	300.00
Remove and resurface Asphalt, Tile Type Flooring on Second, Third & Fourth Floors	780.00
Repair Ceiling on Fourth Floor	100.00
	$40,240.00
W. C. P. L. and S. S. Insurance	1,530.00
Overhead and Profit	4,200.00
Contingency	8,000.00
TOTAL	$53,970.00

We appreciate the opportunity of serving you again and trust that you will call upon us if any or all of the above meets with your approval.

Yours very truly,
PETER KIEWIT SONS' CO.
By Peter Kiewit (Signed)
Peter Kiewit

PK:TF

MR. A. L. JACOBBERGER, having been previously produced and duly sworn on behalf of *Kimball Laundry Company*, testified further in rebuttal as follows:

Direct Examination by Mr. Hotz:

Q. When you were on the witness stand, Kimball Laundry Company Exhibit 21 was referred to by you as being a complete list of property that was owned by the Kimball Laundry Company at the time of the taking. During the cross-examination and during the examination of other witnesses by the government, it was stated that certain

items on the Kimball Laundry Company's Exhibit 21 actually belonged to the government. I will ask you if you have made a check of such items and collected them together in the form of an exhibit and totaled them up, and if those items, as a matter of fact, should not be actually excluded? Is that right?

A. That is right, yes, sir.

Q. Calling your attention to Exhibit 54, I will ask you to state just what that is?

A. These items consist of some skid baskets.

Mr. Murphy: That wasn't the question. Is it a summary of something, or what is it?

[fol. 972] A. It is an itemized list and a total showing those items that were included in our exhibit that should not have been in there.

Q. Does it give the numbers, the item number, so that it can be traced readily on Exhibit 21? A. Yes, it does.

Q. How many items are there? The exhibit shows for itself, but just as a summary.

A. There are ten listings on here, consisting of 135 items.

Q. Do you know whether or not the numbers you have on Exhibit 54 in your hand correspond to numbers on Exhibit 21? A. Yes, they do. I made this up myself.

Q. And they do correspond? A. Yes.

Q. Were the valuations and totals on the right-hand column here taken from the center column on Exhibit 21?

A. They were.

Q. So that the deduction is the same as the figure that was included in Exhibit 21?

A. As to their value in 1942.

Mr. Hotz: We offer in evidence Exhibit 54.

Mr. Murphy: Without waiving in any manner our po-

[fol. 973] sition, I am not going to object to this. It is a small item and will make no objection to it.

Kimball Laundry Exhibit 54, found in Volume III, at Page 1095.

[fol. 1095] D. EX. 54 (Received)

These items inadvertently included on K. Laundry Co's Exhibit No. 21

Item No.		
156	4 large skid baskets	23.85
157	10 medium " "	50.88
361	12 large " "	72.00
362	40 small " "	205.50
492	5 small " "	11.25
493	23 medium " "	117.02
494	29 large " "	172.95
593	1 #6 drag basket	6.40
	124	$659.85
164	8 G. I. Buckets	5.00
163	3 Monel metal buckets	8.00
		$672.85

These items were sold to the Quartermaster on Dec. 1942. Should come off of our Ex. 21. A. L. J.

Q. What is the sum total while you have it in your hand there? A. $672.85.

Q. There has been some talk here in connection with taxes. I will ask you if the Kimball Laundry Company has any other tax liability aside from real estate and personal taxes in Douglas County, city and state taxes, the regular taxes, if there is any?

The Court: On the property that was taken. Is that it?

Mr. Hotz: On the corporation.

Mr. Murphy: We object to any taxes on the corporation.

The Court: That will be sustained. You have an agreement with counsel and the Court's consent to supply the statement of the real estate taxes prepared by the County Treasurer, that you might offer such statement in lieu of laying a further foundation. Have you that statement?

Q. With these tax statements I am handing you here

[fol. 974] from the County Treasurer, have you sum totaled the amount of the taxes?

Mr. Murphy: Pardon me, if I may interrupt a moment. May I see them? Perhaps we can agree on this without anything further.

The Court: Certainly. Look at them. These are the annual taxes, or all the taxes?

Mr. Hotz: They are the taxes for the period for 1943, 1944 and 1945.

Mr. Murphy: If the court please, I am perfectly agreeable to allowing the amount of tax on the property, but these items include one item of intangible tax, which is not within our agreement, and it also includes some interest, for which we are not responsible. If counsel will at any time before the close of the day compute the original property taxes, I will agree to the amount of them.

The Court: Mr. Jacobberger can do that, or one of these men who are not busy right now can do it. What we want is the principal of the real estate taxes. If the machinery, or any part of it that was taken was assessed as personal property, you can separate that. That should go in.

The Witness: I might suggest those were gotten together by Mr. Harry Jacobberger and he can help you get [fol. 975] them lined up.

Mr. Hotz: We will pass to something else.

Q. Calling your attention to Exhibit 21, I will ask you to state if you have made a readjustment of the items on Exhibit 21 concerning which testimony has here been given by the other side? A. Yes, I have.

Q. On the items of machinery, the total that is either gone or beyond repair, to your knowledge.

A. I made an adding machine tabulation of all the items that are not shown in the far right-hand column, that is, the value of, 1945, November, 1945; in that column there were a number of items that do not show there. I think the total there are 144 items, and out of those 144 items—

Mr. Murphy: Just a moment. I think the witness has answered the question.

Q. What is the total?

Mr. Murphy: Objected to as incompetent and immaterial and not proper rebuttal testimony.

The Court: I take it this is just an exhibit to help. His evidence is all in the record. All he is doing is giving us the footings and he has testified he has personally done that, in assistance to all of us, whether it is evi- [fol. 976] dence or not. It isn't evidence. It is simply a compilation or addition of figures we have all considered. What is the total? A. The total of those items is $11,492.31.

Q. Calling your attention to this paper which the Court Reporter has marked Defendant's Exhibit 21-A, which is a tabulation, an adding machine tabulation, I will ask you to state whether or not that tabulation is the figure—

The Court: —the figure prepared by you and is correct.

Q. —is the figure you have just given? A. Yes.

The Court: Is it correct?

A. Yes, to the best of my knowledge.

The Court: That is the best any of us can do.

Mr. Hotz: We offer Exhibit 21-A in evidence, an addition to Exhibit 21.

Kimball Laundry Exhibit 21-A, found in Volume III, at Page 1066.

Tabulation taken from Ex. 21, items not shown in column 3, that are either of no value or have been destroyed, $11,492.31.

Q. It has been stated here in evidence introduced by the other side that the matter of keeping the laundry machinery and equipment in a state of repair was a part of your duties. Do you recall that that statement was made by Mr. Crowder, or Mr. Moister, on the witness [fol. 977] stand here in this courtroom in this trial?

Mr. Murphy: Just a moment. At this time I am going to have to object to the question in that form. I know I have passed it right along, but particularly counsel's stating his recollection and understanding of the evidence, as incompetent and not a proper question. He can ask

the witness what his duties were and that is all that is necessary.

The Court: Oh, we are wasting time. It has been testified here, Mr. Jacobberger, that part of your duties was to take care of the machinery in the laundry. What is the fact? Was that part of your duties, or not?

A. The part of my duties as superintendent of the quartermaster laundry was to supervise two to three maintenance men that we had working for us and to see that they performed their operations and their duties, and in the matter of the repair items, that is, items of repair that had to be purchased, it was merely my duty to call to the attention and recommend to the commanding officer what was needed and it was up to him to see that I was furnished with the repair items from time to time.

Q. Did you make requests for those in writing, by letters that were from you to the Quartermaster Corps?

[fol. 978] A. Sometimes in writing; most often just verbal or notations.

Q. Do you have with you that correspondence or the requests that were made from time to time by you?

A. I have some, yes.

Q. Where is that, please? A. I have it here.

Q. Just explain what it is, in the nature of correspondence?

A. Well, at times, after the normal procedure of talking to and asking and inquiring verbally and by notation didn't bring forth the desired results, sometimes I reduced those requests to writing and that is what these are.

Q. Do you have some of that correspondence there?

A. I do.

The Court: I wonder if that is necessary. Aren't you unnecessarily encumbering the record? You are making a pretty expensive record here for somebody.

Q. I will ask you this, did you, from time to time, make requests to the head of the quartermaster corps to make repairs and furnish the necessary things that were required and did they do so?

A. Yes, I made the necessary requests. They weren't [fol. 979] always carried through, but it was not neces-

sary that I make them in writing. It was purely a verbal normal transaction, but in exasperation sometimes, I did make these in writing, figuring they would merely become a record for my own protection if they weren't accomplished.

Q. And that is what you have in your hand? A. Yes.

Q. That is what you are ready to have identified as the requests you made to the quartermaster corps to have certain repairs in that plant of a major nature? I don't want anything minor, but of a major nature taken care of? A. Yes.

Q. I want you to state whether or not they were taken care of in accordance with your request or not?

Mr. Murphy: Objected to as improper rebuttal testimony, a part of their case in chief.

The Court: Sustained.

Mr. Hotz: We offer to show by the witness, in his correspondence, that there were numerous requests that were made throughout the entire period, requesting that repairs be made to the machinery and equipment; that it was deteriorating; that it was being ruined for lack of [fol. 980] repairs; and that little or no attention was ever paid to it.

Mr. Murphy: Same objection as to the question, and for the further reason that the offer is broader than the question.

The Court: Objection sustained. The offer will be denied.

Q. In connection with Government's Exhibit 5-A, which was introduced here and identified by a lady named Hergert from the quartermaster corps at Fort Omaha, I will ask you to state if Exhibit 5-A, which has a total of $17,430.95, and it was stated from the witness on the witness stand, Mrs. Hergert, that those were items of repairs and maintenance that were charged to the Kimball Laundry Company, I will ask you to state in very short language what all of the items on that exhibit pertain to, with the exception of one item?

Mr. Murphy: Objected to as not the best evidence, the exhibit speaking for itself. I don't understand it. I will withdraw the objection.

The Court: It is to identify, I take it, different items that are listed on there, what they were, to rebut her testimony that it was all charged to the United States. Overruled.

A. Practically all the items on this statement, which [fol. 981] is a list made by Fort Omaha Engineers, pertain to repairs on boilers. There are a few other items, but for the most part they pertain to repairs that were made necessary on the boilers because of the—

Mr. Murphy: Objected to as—

Mr. Hotz: Wait a minute. That is all.

The Court: Wait a minute. What is the objection?

Mr. Murphy: I just stopped the witness, he having answered the question.

The Witness: I had one more item on there.

The Court: Let him finish his answer. He says he hasn't finished.

A. There is one large item on here which was for repairs to floors in the amount of $7300.00 that was made necessary.

Q. How does that item read on there, that $7300.00?

A. It says: Repairs to mastic floors 2, 3, 4, $7351.88.

Q. That is, out of $17,430.95, the item of $7351.88 is repairs to mastic floors? A. Yes.

Q. Has that repair to the mastic floors placed the mastic flooring in a good condition of repair at the present time?

Mr. Murphy: Objected to as not proper rebuttal testi- [fol. 982] mony, and for the further reason that all of the testimony on that point covers putting it in condition at this time, not at that time.

The Court: Sustained.

Q. What boiler were these repairs on this Exhibit 5-A applied on?

A. There are two boilers in the plant and they were one or the other. It doesn't explain on here which boiler it was, but there was a 225 horse power boiler and a 300 horse power boiler and it was either on one or the other.

Q. Either on one or the other, and that difference then would be somewhere in the neighborhood of $10,000.00

that was repairs to the boilers, is that right?

A. There are some other items on here which weren't boiler; I would say around $8000.00 of it was boilers, so far as I can mentally calculate on this sheet.

Q. What is the difference between the pressure in a boiler, if you know, and the use of that boiler in connection with hot water? Is there any relationship between the two that will give us any information on the necessity for those repairs? From your own observation, what made those repairs necessary?

[fol. 983] Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained.

Q. Did the repairs that you have indicated on Government's Exhibit 5-A place the boilers, at the present time, in a condition that they may be used and operated as they now are, or must they have the other and additional repairs or replacements to which you have heretofore testified?

Mr. Murphy: Objected to as not proper rebuttal testimony, there being no claim that there are not additional repairs needed.

The Court: That will be sustained. This testimony of Mr. Jacobberger's was permitted because the young lady who prepared this list said it was a list of repairs that had been requisitioned and came through her office and she didn't know whether they had been used to replace or repair or what not. I permitted Mr. Jacobberger, who was there as the superintendent of the plant, to testify what on this list was used for repairing the machinery and for that purpose only. That is rebuttal, that far.

Q. Calling your attention to Defendant's Exhibit 55, [fol. 984] I will ask you to state whether or not that is a bid, one of the bids which was received on the boiler installation, and what is the other one?

A. This one is on the boiler installation only. There is another one on the hot water heater and reclaimer.

Q. I will ask you to state whether or not the letter which you have in your hand from J. J. Hanighen Company, Defendant's Exhibit 55, is the bid that pertains

to Exhibit 23, which was identified and introduced in evidence and received in evidence heretofore in this trial, and if so, state which item on Exhibit 23, Exhibit 55 refers to?

A. This Exhibit 55, Kimball Laundry Exhibit, is a bid on a boiler which was in the Kimball Laundry Exhibit 23. In other words, it is a bid to replace the boiler that we contend had been damaged beyond use.

Mr. Hotz: We offer in evidence the bid of Hanighen, the letter, Exhibit 55.

Mr. Murphy: Objected to as not proper rebuttal testimony and being a part of their case in chief.

The Court: Sustained.

Mr. Hotz: We offer to prove by Exhibit 55, and to prove by this witness, to verify the items in Defendant's Exhibit 23.

Mr. Murphy: Same objection and for the further reason I know of no procedure for making an offer of proof on an exhibit.

The Court: I don't either, but I am learning something lately.

Kimball Laundry Exhibit 55, found in Volume III, at Page 1096.

[fol. 1096] DEF. EX. 55 (Rejected)

March 11, 1946

Mr. H. A. Jacobberger
Omaha, Nebr.

Subject: New Boiler installation—Kimball Laundry

Dear Sir:

We are pleased to quote you on the installation of new boiler at the above subject location as follows:

For furnishing all labor and material to install one 3-C-18 Erie City Iron Works boiler 270 H. P. complete with soot blowers, breeching connection, steam-boiler feed and blow off piping and all boiler trim, necessary brick setting and insulation for the sum of Twenty-one Thousand Six Hundred Seventy-eight ($21,678.00) Dollars.

The above does not include any structural building changes, removal of old boiler and stoker or new boiler footings.

In the matter of mechanical firing equipment, we offer Simplex Oil Heating Corporation's Industrial Turbine type burners with fan and pump sets, high pressure and low water automatic protection, with necessary oil preheating equipment, and 10,000 gallon oil storage tank, to be built in present coal bin for the sum of Six Thousand One Hundred Eighty-three ($6,183.00) Dollars. This equipment will burn Number 6 or Bunker "C" industrial oil.

The above prices are based on today's quoted cost of materials and labor and must be increased or decreased to meet our costs prevailing at the time of delivery of materials or performance of labor.

Thanking you for the opportunity of quoting and trusting we may have your valued order for this business, we remain,

Yours truly,
J. J. HANIGHEN COMPANY
By J. J. Hanighen, Jr.
J. J. Hanighen, Jr.

JJHJr/whm

Q. You were here in the courtroom, were you not, and listened to the government witnesses in connection with various bids they had received for different items of work? A. Yes, sir.

Q. Do you recall the testimony in reference to the boiler and amount of money it would take to place that boiler in a state of repair? A. Yes, I do.

Q. Did you hear them talk about bids in connection with painting? A. Yes, I did.

Q. And bids in connection with structural work?

A. Yes.

Q. And did you not have an opportunity to examine Government's Exhibit 17, which was prepared by Mr. Crowder and testified to by Mr. Crowder? You recall that, do you not?

[fol. 986] A. I want to be sure, to see the exhibit. I don't know whether the number is right.

Q. Do you have in your hand now Government's Exhibit 17? In that statement is there a bid that Mr. Crowder testified to had been received in connection with that work?

A. There is an item, No. 8, on here. Yes, I heard them testify to this with reference to repair existing boiler there in the amount of $5800.00.

Mr. Murphy: Just a moment. I don't think that is included in the question.

Q. And the amount that is given in that exhibit is how much? A. $5817.50.

Q. In pursuance of your effort to determine what you considered the facts in connection with that item, did you make inquiry from the J. J. Hanighen Company to determine what it would cost to place that boiler in the state of repair and use that it was necessary in the commercial operation of that laundry?

Mr. Murphy: Objected to as incompetent and immaterial; an improper question; the court having repeatedly ruled on that very point.

[fol. 987] The Court: That will be sustained. It isn't going to help your case to keep reiterating. Mr. Jacobberger has told us frankly what in his judgment he thought the damage was. You were given every latitude to support his testimony. You rested. Now, in rebuttal, this is not rebuttal testimony. It isn't helping your case for Mr. Jacobberger, who hasn't changed his mind any since he testified before, as to what this is going to cost. It is for the jury to say which of these men has the better judgment, from all the evidence. Let's confine ourselves to the rules. If you have any rebuttal testimony, I want you to introduce it, but I don't want you to rehash the case in chief.

Q. I want to hand you Government's Exibhit 10, and without going over item by item, I would like to have you turn to sheet No. 5, and ask you to state what is related on that page that you consider to be in error, to your

personal knowledge?

A. Item 5 on sheet 5 is concerning an American Laundry Machinery Company extractor 26", that was located on the second floor of the quartermaster laundry, and in Mr. LaTurner's and in Mr. Newcom's report it states this item was not used by the government and [fol. 988] therefore no restoration. I happened to be there as superintendent of that plant and know that machine was used in the operation of the quartermaster laundry.

Q. And from that use, do you know whether it is in need of repair or not?

A. Right at this moment, I couldn't say, no, sir.

Q. Turn to sheet No. 30.

A. Do you wish me to explain this?

Q. Yes.

A. This No. 30 is an American handkerchief ironer, also an American Laundry Machinery Company piece of equipment that was used extensively in the operation of the quartermaster laundry, and while there were some repairs made to it during the past sixty days, it did not include all of the items. That machine was originally equipped with an asbestos padding that goes around the roll and it is quite an expensive item. I don't know just exactly what it costs now, but that is not included on this report.

Q. On sheet No. 30? A. On sheet No. 30, no, sir.

Q. Take sheets 48 and 49, together?

A. 48 and 49 are with reference to some laundry [fol. 989] press machines called Zarmo pressers, and the repair sheet on No. 48 indicates that the machine merely needs some rubber bumpers, and on 49 it is marked OK, when, as a matter of fact, the aluminum ironing surface of those machines have been badly scarred in the use in the last three years and shall have to be polished up to restore them to their original smooth ironing surface.

Q. Items 52 and 53—

Mr. Murphy: If the court please, petitioner objects to this as incompetent and not the best evidence, Respondents having produced in evidence here this morning their own experts' detailed statements of these same repairs and the figures that they have estimated for each of them, and it seems to me that fully covers any rebuttal on that.

The Court: Here is the owner of the property. Some witnesses testified that necessary repairs were required on certain of this machinery and he says they were in error, that it was damaged, or used more than they stated and it should be considered by the jury. That is proper. It is the first chance he has had to offer that testimony. Overruled.

A. Items 52 and 53, likewise, are laundry press machines and they have failed to include the reconditioning [fol. 990] or polishing of the aluminum ironing surfaces of those machines. These are just matters that I personally have knowledge of, personal observation, and that is why I mention them at this time.

Q. Turn to the item of Ash Hopper—just lay that exhibit aside and we will not go any further into that, or Government's Exhibits 11 or 21, but take Government's Exhibit 17, and turn to the item of Ash Hopper, on which, as I remember, there is nothing there. That is supposed to be, as I take it, in a good state of repair and doesn't need any improvements or expenditures upon it?

Mr. Murphy: Objected to as incompetent and immaterial; not proper rebuttal; this witness having testified in his case in chief in detail all the items of the building and power plant that he claimed needed repairs and made no mention of ash hopper at that time.

The Court: Did you overlook the matter of the ash hopper?

A. No, on my exhibit I have the ash hopper in there.

The Court: You did testify to it then?

A. As to its value.

[fol. 991] The Court: Objection sustained.

Q. There is an item there of heat reclaimer, which the government seeks to handle on the basis of forty per cent taxable to the Kimball Laundry Company and sixty per cent taxable to the government, or vice versa. Which is it?

A. It is marked forty per cent of the total to be chargeable to the government and sixty per cent borne by the Kimball Laundry.

Q. Sixty per cent borne by the Kimball Laundry?

A. Yes, sir.

Q. What is the total of the item there in the left-hand column?

Mr. Murphy: Objected to as incompetent and immaterial and that particular item having been gone into in the case in chief. They have offered, and it has been received in evidence, a specific bigger expense on that item.

The Court: Sustained:

Q. It is here in connection with a hot water heater on the roof, and the welding man came in and gave some testimony in connection with that item, that it could be welded and fixed up for some $600.00. In the course of his testimony, he stated that he had opened a petcock, or valve, or something, to see whether or not [fol. 992] the water in the shell surrounding the inner part of the tank showed any evidence of water or seepage in there that would cause rust. I will ask you to state, in reply to that witness' testimony, what you personally observed in connection with the rust in the water.

Mr. Murphy: Objected to as not proper rebuttal testimony, and further is not correctly reflecting the testimony. The testimony of the witness for the government was that there was water in there.

The Court: Sustained.

Q. I will ask you to state whether or not in the

operations of the laundry there have been complaints in connection with laundry being soiled by rusty water?

Mr. Murphy: Same objection.

The Court: Sustained.

Mr. Hotz: I don't want to be—

The Court: There isn't any dispute about there being rust in that water. One man didn't see it, he said. The testimony on both sides is that the inner copper wall was broken down and the water got in against the shell. He testified he came in from the outside and tested it.

Q. Mr. Jacobberger, I will ask you this question: I [fol. 993] will ask you where does the water come from from the hot water heater that comes down into the plant for the purpose of washing clothes? Where does that come from and from what part of that apparatus?

Mr. Murphy: Same objection, having been gone into in the case in chief.

The Court: Sustained.

Q. There is an item of soft water heater on Exhibit 17, and in the explanation that is given there, or the statement that is given there, and given by the witness Crowder in making his statement, what, if anything, did you observe was left out completely on the water softener item by the government's witness?

A. That is Item No. 20, water softener.

Mr. Murphy: If that is Item 20, the Government objects to that question as incompetent and immaterial, the exhibit not detailing or listing what is included, and therefore it is impossible for the witness to say what was left out, and he said, water softener repairs, so much money.

The Court: There was testimony with reference to the water softeners. I take it what Mr. Hotz is trying to get the witness to get at is to have the witness say [fol. 994] whether or not there was some part of the water softeners that he discovered was not being considered as a part of the value of the machine. Am I correct in that?

Mr. Hotz: Yes, you are, Your Honor.

The Court: Very well. Then testify if they overlooked some part of it they didn't appraise and which should be put in their item.

A. In the matter of the water softeners, the softener is a huge tank filled with mineral and the mineral inside deterioriates from use and every so often it has to be replaced; some of it has to be taken out. It is a coarse, prepared mineral and it finally deteriorates into a very fine powdery flakes.

The Court: In other words, it gets muddy?

A. Your Honor, rather these grains break up until they become very minute and useless. They have to be replaced.

Q. Did you take that into consideration in your estimates? A. Yes, I did.

Q. And they were not taken into consideration, as you view it, in the government's, is that right?

Mr. Murphy: Objected to as calling for a conclusion [fol. 995] of the witness. There is nothing here; no way the witness can testify.

The Court: That will be sustained.

Q. Go to the air compressor. A. Item 27.

Q. You will recall when you made up your Exhibit 23 the air compressor was out of commission completely. Do you remember that? A. Yes, I do.

Q. Mr. Crowder says he bought a second-hand air compressor from the Union Pacific Railroad Company and fixed it up and that it is in good serviceable condition and would restore to the Kimball Laundry Company that item. I will ask you to state if you have made an inspection of that air compressor since it has been in there and what you found?

A. The other day when I was in there and as I looked at the air compressor they were having difficulty making it run. It had been just installed and started up a day or two before that time. It is an air compressor that was reconditioned. I don't know what condition it is in outside of looking at the outside of it, and they

were having some difficulty in making it operate properly at that time.

[fol. 996] Q. From your observation of that machine, will that compressor, in the condition you found it in the last few days, place the Kimball Laundry Company's air compressor in the same condition that it was when you turned it over to them in 1942?

A. Well, I am not an engineer to know what condition the machine is in without tearing it down and there isn't an honest way of telling whether it is going to be adequate or not, but I do know the one that was in there was working very satisfactorily, and received careful attention, repairs at all times. I don't know what the inside of this one is, I couldn't vouch for how long it would operate.

Q. But, your air compressor is gone? A. Yes, it is.

Q. I will ask you to state what occurred in reference to the boiler room in 1945, I think it was the summer of 1945, that you consider would have a bearing upon the entire boiler room, the power equipment in the boiler room, the smoke stack, and all of the items listed together to make up that power equipment?

Mr. Murphy: Petitioner objects to that as incompetent and not proper rebuttal testimony. It is part of the case in chief.

[fol. 997] The Court: That will be sustained.

Mr. Hotz: If Your Honor please, in the record, at the time Mr. Hillmer was on the stand, we offered some audits of a certified public accountant and one of them was in several parts originally, with several pages. I wanted to have in the evidence from Exhibit No. 6, the list of the plant machinery and equipment, and the reports placed thereon which had been prepared by Mr. Hillmer from the books and records that were in court. In the rejection of the exhibit, the court stated that it would reject the exhibit with the exception of the next to the last page. The next to the last page was almost the same thing, excepting that it was in reference to the building, and with repairs on the building and cer-

tain percentages. We have something else in the record in connection with the building, but we do not have anything in the record at all in connection with the machinery and repairs on the machinery. I want to draw the conclusion as to what, in the past few years, for example, was done in connection with the upkeep and repairs in the manner of keeping that plant in a good state of repair of the machinery and equipment, as compared to what was done from these exhibits of the army. [fol. 998] It has to do, in our estimation, with not only the cost of equipment in that building, which is shown in one column, but also the manner in which it was kept up, and I ask the court to permit us to introduce page 7 of Exhibit No. 6.

Mr. Murphy: Object to the offer for the same reasons as originally stated, and for the further reason it is not proper rebuttal testimony, and call the court's particular attention to the strictly incompetent lists on there, with no foundation whatever of valuation on land or cost of machinery, which the evidence showed was not even there at the time the plant was taken over.

The Court: Let us keep the record straight. I have checked the record. Here is what occurred. You had a study prepared by this witness, consisting of six or seven sheets, whatever the exhibit says—

Mr. Hotz: Seven.

The Court: Seven sheets. After it was offered and after you made such foundation as you felt was proper, the court ruled that the exhibit, all of the exhibit, was incompetent and would not be allowed, except the second to the last sheet, which was No. 6, as I got it.

[fol. 999] Mr. Hotz: That is right.

The Court: And that if counsel elected to offer that sheet separately, it would be received. You then stated to the court that the entire exhibit was a completed study and that one sheet would be of no value to you at all and you did not elect to offer that sheet in evidence and went on with your case. That is the record.

Mr. Hotz: Then the court ruled that that sheet could go in.

The Court: But you elected not to put it in and told the court you wouldn't put it in. I invited you to. Why did you change your mind?

Mr. Hotz: We are talking about the other sheet. One was machinery and equipment and the other was building, and the one I wanted in particular was machinery.

The Court: I know, you want it all in.

Mr. Hotz: That is true, but it was the machinery. The other was of no particular benefit.

The Court: Your application will be denied.

Q. You had been the superintendent in charge of the operation of the plant of the Kimball Laundry up to the time it was taken over by the government?

A. I was part owner of the plant and general manager.

[fol. 1000] Q. I know, but you were in charge of operations down there for the Kimball Laundry Company? A. Yes.

Q. The government has offered in evidence here certain exhibits in reference to the amount of repairs that were made on the machinery and equipment while you were in charge. I will ask you to state whether or not the army, in its operations, kept the machinery and equipment in the same, or similar state of repair as the Kimball Laundry Company had been doing right up to the time of the taking?

Mr. Murphy: Objected to as incompetent and immaterial and not proper rebuttal testimony and an attempt to show indirectly what the court has just ruled out on a direct ruling.

The Court: Sustained.

Mr. Hotz: We offer to show by this witness that to his personal knowledge, the cost of the equipment on the books and records of the Kimball Laundry Company in 1942, at the time of the taking, was $405,294.81. We offer to show that; and in the year 1942, $6358.43 was expended for repairs on machinery and equipment; that is, laundry machinery and equipment; and in the year 1941, $7217.91; and in 1940, $4583.53; that the average

[fol. 1001] expense for repairs to plant machinery and equipment over the nineteen-year period was $6097.39, or 1.92 per cent of the cost; that the books and records of the Kimball Laundry Company are here in court and can be identified by this witness to show this result. The same is offered at this time to rebut the evidence of the upkeep in repairs and replacements by the government during its operating, and tending to show the deplorable condition in which the machinery and equipment is at the present time.

Mr. Murphy: Same objection as to the original offer of the exhibit, and for the further reason that the present offer is broader than the question and constitutes a procedure unknown to Federal procedure.

The Court: Sustained.

Q. Mr. Witness, when you were on the stand some while ago and made some reference to the taxes on the property, real and personal, you stepped aside while we made up those taxes, and it is agreed now between Mr. Murphy and myself that three years of taxes on this property, including the real and personal, would be $19,917.76, or an average of $6639.25 per year. Is that near enough?

Mr. Murphy: For the purpose of the record and to [fol. 1002] avoid delay, I will stipulate that is approximately correct. I haven't had a chance to check them. It couldn't be off enough to affect the final figure in any material amount, anyway.

Q. I want to ask you one final question. It has been testified to here in this case that the repairs and replacements, as testified to by Mr. Crowder on Government's Exhibit 17, and by Mr. Newcom and Mr. LaTurner in connection with Exhibits 10, 11 and 12, and the summary of those exhibits, that the expenditure of that money would place the property in a good state of repair and restoration so that you could start off and run the laundry in a good operable condition. I will ask you to state whether or not in your opinion that is correct or incorrect?

Mr. Murphy: Objected to as incompetent and immaterial; no proper foundation laid; this witness, while he is owner, under the Nebraska law being permitted to testify generally to values, is not qualified, nor has he attempted to qualify himself as an expert on these mechanical points so as to determine the values of repairs.

The Court: That will be sustained. He has gone all over the question of repair and replacement that is material.

[fol. 1003] Mr. Hotz: Let me ask him this question.

Q. With the exception of the air compressor concerning which you testified that they got from the Union Pacific, have any of these repairs or replacements that have been testified to by LaTurner or Newcom or Crowder been made?

Mr. Murphy: Objected to as incompetent and immaterial and no claim they have been made.

The Court: Sustained.

Mr. Hotz: That is a preliminary question.

Q. At the present time, is the Kimball Laundry Company able to run and operate as a commercial laundry at all?

Mr. Murphy: Same objection, incompetent and immaterial and not proper rebuttal testimony.

The Court: And it brings up a question that arose, I think, from the testimony of Mr. Harry Jacobberger when he was on the stand. The court has given considerable thought to the proposition that you are now approaching. How long will it be after the possession of the property is surrendered before it can be repaired and put in running order, and the possibility of probable future damage if they do not surrender the property at once. We are confronted with two contingencies here. [fol. 1004] First, the property has not been surrendered and we don't know whether it is going to be continued beyond the 30th day of June, 1946, or not. If it is continued further, there will be other wear and tear and possible damage. If the property were surrendered now, there is about three months before the time that we are

considering in which to get it back in running order, but those are contingencies that we can not deal with now. The court has come to the conclusion that Kimball Laundry Company is entitled to just compensation in this suit for the taking of this property up until it is turned back in the condition or in the value it was when it was taken. That being so, I feel that I shall continue, or retain jurisdiction in this case beyond this trial for any future contingencies. I feel that, as I said, Kimball Laundry Company is entitled to just compensation in this suit. They should not be required to have to go to some claim department or get authority from congress to sue, or something else. I don't feel that should be, here, so we will just defer it and my instructions to the jury cover this matter again. We will have no more testimony on these two contingencies. The case will be continued here [fol. 1005] until it is finally settled and possession is obtained, and it will then be for the government and the laundry company and its officers to negotiate any future contingent damage that there may be, and of course, if they do not come to an agreement, the court will be here with another jury to try out any such additional items. Let's get that confusion out of the case. I should say while I am on the subject, when you are considering the final judgment in the case, I want a provision in there that I will retain jurisdiction of the case for two purposes: First, on the question of interest, and Secondly, on the question of any future damage arising under either one of these two contingencies. Put that right in the judgment.

Mr. Hotz: One item, and then I will be through with this witness.

Q. Mr. Jacobberger, when you were first on the stand the court made some statement that it might be well to have a figure that would be translated into poundage on the capacity of this laundry.

Mr. Hotz: Mr. Jacobberger took that to mean that he was to do so.

The Court: I received some exhibits with the dollar sign attached. I received them in evidence on your prom-
[fol. 1006] ise that you would break them down into poundage to show, or tend to show the capacity of the plant. That will be permitted if you are prepared to do so. When you were on the stand at that time you gave some estimates, but since then have you given the matter further consideration so as to get more accurately at the proper figure?

A. I did, Your Honor, to give it in pounds.

The Court: Suppose we have that now in connection with your former testimony, as part of the evidence in chief in the case.

Q. You might tell how you went about it.

A. I prepared here a memorandum, is all, that shows, based on the number of washing machines and their sizes, that we have in the laundry department, to give a total of the number of pounds of laundry that can be produced in the Kimball Laundry Company, or could be produced in the Kimball Laundry Company per day, and again on per week, and on an annual basis.

Q. May I see that a moment? I think I can shorten it up. Yes. As a matter of fact, I haven't had a chance to look at it. Al just called my attention to it.

Mr. Murphy: I will say this: The witness has a couple of items at the top that don't pertain to this. If you
[fol. 1007] want to tear it off, I will have no objection to the exhibit.

Mr. Hotz: The weights of a couple of items. Maybe that has something to do with it.

Q. Does that have anything to do with it? A. No.

Mr. Hotz: Then they should come off.

Q. Does the weight show capacity?

A. No. It is just a memorandum I made.

The Court: Mark it and we will have it attached to his testimony in chief.

Q. Handing you Exhibit 56, will you explain that to the jury?

A. This is a compilation of figures based on the number of washing machines we had in the Kimball Laundry Company, what their capacities are, and based on the number of runs per day, how many operations during an eight-hour day we could expect out of each washing machine. With that in mind, I drew up some figures here which will give in totals the amounts of pounds of clothing that we can wash. This is for the laundry only, and does not include dry cleaning. For the laundry only, total per day for how many pounds we can wash and process, 34,410 pounds; or per week, 206,460 pounds; [fol. 1008] or based on twenty-six operating days per month, would amount to 894,660 pounds; and on per year, a total of 10,735,920 pounds. That is on a one-shift basis.

Q. That is an eight-hour shift?

A. Yes, eight-hour shift per day, six days per week, forty-eight hour week.

Q. Does that complete the items on the exhibit?

A. Yes, sir.

Mr. Hotz: We offer that in evidence as a summary of the witness' testimony.

The Court: It will be received and the Reporter is directed to take it as part of his testimony in chief.

Kimball Laundry Exhibit 56, found in Volume III, at page 1097.

[fol. 1097] D. EX. 56 (Received)

Number of Wash Machines and Their Capacity and Totals of Laundry and Wash Only

	Items
11 Wash machines 42 x 84—300 lbs.	3300
11 Wash machines 36 x 54—175 lbs.	1925
1 Wash machine 42 x 54—154 lbs.	150
9 small machines 24 x 36	360
per run	5735

43,410 pounds per day
206,460 pounds per week

894,660 pounds per month
10,735,920 pounds per year

on a one-shift basis, 8-hour day, six days a week.

Mr. Hotz: That concludes the testimony of the Kimball Laundry Company.

Mr. Murphy: Before we adjourn, I think the Court's attention should be directed to a couple of pleadings filed today, one by Mr. Hotz in the nature of a petition on appeal, and a motion on our part to strike. It seems to me it is a repetition of some things we have had before. [fol. 1009] Let the court see them. I don't know if they need to be ruled on at the moment.

The Court: I think I will have to rule on this first thing in the morning and I will take a little time to look at them.

March 19, 1946.

The Court: It is ordered by the court that motion to strike respondent's petition on appeal to United States District Court, filed March 18, 1946, be sustained, and the petition be stricken from the files and records of the court.

(For Instructions to jury, government's requested instructions, Kimball Laundry Company's requested Instructions, and Verdict, and proceedings before court to withdraw in part finds without prejudice to appeal. See Transcript of Record. Vol. I, pp. 150-180. Print.)

[fol.—Vol. II—1010 to 1045 orig. printed on pages 150 to 180—Print Vol. I.]

[fol. V. II, 1045] VERDICT OF THE JURY

The Court: Have you arrived at a verdict, gentlemen?

The foreman of the jury: Yes.

The Court: The foreman will kindly hand it to the clerk. The clerk will read the verdict.

The Clerk: (Reading) In the District Court of the United States for the District of Nebraska, Omaha Division. United States of America, Petitioner, against

Kimball Laundry Company, a corporation, et al, Respondents. Number 404 Civil. Verdict of Jury.

See page 95, supra, Volume I, General Verdict 1. We, [fol. V. II, 1046] the jury, duly empanelled and sworn to try and determine the issues in this cause, do find and determine that the just compensation for the taking by petitioner of the right to use and occupy the property known as the Kimball Laundry Company, consisting of the real estate known as the East 22 feet of Lot 7, all of Lot 8, Block 171, Original City of Omaha and one foot strip adjoining said real estate on the North, all in the City of Omaha, Douglas County, Nebraska, together with the improvements thereon and all personal property thereon and therein and used in connection with said laundry, excepting only delivery equipment, and subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, for the term commencing November 22, 1942, and ending June 30, 1946, and including just compensation for any failure of petitioner to return the said property to respondents in the condition in which it was on said November 22, 1942, to be the sum of $297,776.03.

Special Findings 2. We, the jury, do find and determine that the just compensation payable by petitioner for the right to use and occupy said property for the term [fol. V. II, 1047] commencing November 22, 1942, to June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter during the present emergency as determined by the President of the United States, to be the sum of $70,000.00 per annum, payable annually, which said sum we have computed for the term from November 22, 1942, to June 30, 1946, or 3.6 years, making the total rental for said entire period to be the sum of $252,000.00, and which said sum we have included in the total of just compensation in the sum hereinbefore set out in paragraph 1 above.

3. We, the jury, find and determine that the just compensation to date, payable by petitioner, for any

failure of petitioner to return the said property to respondents in the condition in which it was on November 22, 1942, to be the sum of $45,776.03, in addition to the total rental, and which said sum we have included in the sum hereinbefore set out in paragraph 1 above.

Dated: This 20th day of March, 1946. Fred J. Novak, Foreman.

The Court: Is that your verdict, gentlemen?

The Jury: Yes.

The Court: So say all of you?

[fol. V. II, 1048] The Jury: Yes.

The Court: The clerk will file the verdict and it is now ordered that judgment on the verdict be not entered, as is usually done upon the filing of the verdict, but that the court will direct the form of the judgment the clerk shall enter on the verdict, and in this connection, Mr. Murphy, I will ask you to prepare form of judgment in keeping with the instructions which the court gave to the jury, reserving jurisdiction as to any future damage, or future use, beyond the 30th day of June, 1946, and at the same time we will compute any interest that might be due, or provide for a rate of interest until such time as it may be paid. You will submit the judgment to counsel for the Respondents for their approval on the form of it, and if that is not obtainable, bring it to the court and the court will settle it.

Gentlemen, I want to thank you for your service in this case. It has been a long case. It has taken us two weeks and a half, and you have given it very careful consideration. You have been patient with all of us, and I feel you have rendered a real service, not only to the court, but to yourselves. I am going to discharge you [fol. V. II, 1049] now from further service in the case, and from further service during the term. Thank you very much.

[fol. Vol. II, 1049-A] *Proceeding to Withdraw Funds from Registry of Court*

August 8, 1946.

The Court: Let the record show that at this time there appeared before the Court, Mr. William J. Hotz, attorney for the Kimball Laundry Company, and Mr. Emmett L. Murphy, attorney for the Government. Mr. Hotz tendered to the court an application for order to withdraw funds from the registry of the court in the sum of Ninety Thousand Dollars. Thereupon, the court asked Mr. Murphy to state his position in the matter.

Mr. Murphy: Our position in connection with this application is this:

Having paid the money into the registry of the court in satisfaction of the judgment, we do not feel that we have any further official interest or right in the matter of distribution. Therefore, and so there be no misunderstanding, and with the permission of the court, I would like to make a brief statement of our thought in the matter.

There are two points involved. First is this: If this money is withdrawn, and if a new trial is ultimately ordered, either in this court or on appeal, and having in mind the fact that the evidence of the government showed a lesser amount than that of the judgment, there is the possibility of a final verdict and judgment for a lesser [fol. V. II, 1049-B] amount, in which event the respondents would have withdrawn this amount, and in turn be liable back, perhaps, to the government. I merely mention that to the court for the court's consideration. We take no direct position one way or the other. The second point, and this perhaps is more particularly of concern to counsel for respondents, we do not want any later misunderstanding. I will say, frankly, I do not know what the law is on this point; that is, the effect of a withdrawal by respondents of the moneys paid into the court in satisfaction of the judgment upon their right to maintain an appeal. It may be that if respondents withdraw the funds paid into the court in satisfaction of this judgment, such action on their part would be an affirmance of the judgment—a taking of the benefits of the judg-

ment—and thereby constituting a bar to their right of appeal. I do not know that it does. I do not say at this time that it does. I have not had an opportunity to examine the law, but I do want counsel to understand that we naturally reserve the right to raise that point on appeal, if the appeal is continued, so that counsel may be fully advised of his situation.

The Court: In other words, as I understand you, Mr. Murphy, your position is this: The statute Mr. Hotz [fol. Vol. II, 1049-C] has cited provides for the withdrawal of funds deposited at the time of taking and upon the appraisal of the property; that the funds in that condition are entirely different than money paid into the court in satisfaction of a judgment; that the statute does not apply to these particular funds because the government paid them in in satisfaction, as I see it, of the judgment entered in the case, and if the judgment was satisfied the question becomes mute. Is that the position you take?

Mr. Murphy: That is the thought I have in mind. I will say I am not certain on the law and I am not opposing a withdrawal of these funds.

The Court: I don't like the idea of keeping this much money lying idle in the registry of the court. We do not want it here. We have no use for it and want to get rid of it. On the other hand, I do not want to do anything that will deprive them of a right of review of the proceedings of this court. I want to protect them in that.

At any rate, I suggest this: I will not pass on this matter until I dispose of the motion for new trial. In the meantime, look up the question and be sure about it; be certain of what you are doing. I will pass on this motion with the motion for a new trial, and at that time [fol. V. II, 1049-D] we will determine what should be done. When are you going to call up this motion?

Mr. Murphy: I merely wish to repeat we are not here opposing this withdrawal. We simply do not want counsel for respondents to be misled and to assume that he

may safely withdraw it and still appeal. I do not know whether he can, but that is his burden.

The Court: In other words, you are not assenting to his proposition that he may withdraw this money without prejudice.

Mr. Murphy: That is right.

The Court: If he withdraws this money, if there is prejudice, it is his prejudice; you are not waiving it.

Mr. Murphy: No, that is right.

(See motion and order of Court, supra, printed Volume I, pages 137-9, permitting partial withdrawal of funds paid into court after judgment without prejudice to respondent's right of appeal.)

FINIS.

LIBRARY
SUPREME COURT, U.S.

Vol. IV

TRANSCRIPT OF RECORD

(Pages 1 to 19)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

VOLUME IV.

PROCEEDINGS IN

United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 13,494

CIVIL.

KIMBALL LAUNDRY COMPANY, A CORPORATION, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

ber 22, 1942, was the right to use and occupy the laundry to June 30, 1943. The Government, at the end of that period, took an extension of the term for one year, and in the years 1944 and 1945 took additional yearly extensions. The right of the Company to compensation for use and occupancy, for each period taken, we think, accrued at the commencement of the period. The Company's right to damages for injuries to and deterioration of its property, attributable to Government use, accrued at the end of the total term. The Government was obligated to return the property at the end of the term in substantially as good condition as when taken, or to then pay the costs of restoration. We believe that in a case such as this it was not the intention of Congress that the total award, made up of annual rental payments and costs of restoration, should draw 6% interest from the date the Government first went into possession.

The Company contends that it is also entitled to 6% interest "on $34,875.50 for supplies taken by the Government on November 22, 1942; paid July 8, 1943." We find no evidence in the record to support this assertion.

The jury's verdict was well within the evidence. While the total award was much less than the amount claimed by the Company, it exceeded by about $40,000 the highest estimate made by any Government expert witness.

Our conclusion is that the judgment reflects all elements of value which lawfully might be considered in determining the issue of the just compensation to which the Company was entitled, and that no errors of law were committed by the trial court which would warrant a reversal.

The judgment is affirmed.

United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 13,494

CIVIL.

KIMBALL LAUNDRY COMPANY, A CORPORATION, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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[fol. 17] (Judgment.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1948.

Thursday, March 11, 1948.

Kimball Laundry Company, a corporation,
Appellant,
No. 13,494. vs.
United States of America.

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Disfriet of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 11, 1948.

[fol. 18] (Application of Appellant for Stay of Issuance of Mandate.)

Comes now appellant, Kimball Laundry Company, and makes application to the United States Circuit Court of Appeals, Eighth Circuit, or one of the judges thereof, for a stay of the issuance of the mandate to enable the said Kimball Laundry Company, which considers itself aggrieved by the decision of this Court rendered herein on March 11, 1948, to apply for and to obtain a writ of certiorari from the Supreme Court of the United States for the following reasons:

1. The opinion of this Court in the above-captioned case, issued under date of March 11, 1948, affirming a judgment of the District Court of the United States for the District of Nebraska, Omaha Division, wherein the appellee was the condemnor of the property and assets of the ap-

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[fol. 1] (Appearance of Counsel for Appellant)

United States Circuit Court of Appeals,
Eighth Circuit.

Kimball Laundry Company, a corporation, Appellant,
No. 13,494. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

WILLIAM J. HOTZ,
HOTZ & HOTZ,
1530-5 City National Bank Bldg.
Omaha 2, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1947.

(Appearance of Mr. Joseph T. Votava and Mr. Charles D. Hitch as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

JOSEPH T. VOTAVA,
CHARLES D. HITCH.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 18, 1947.

[fol. 2] (Appearance of Mr. David L. Bazelon, Mr. Roger P. Marquis and Miss Wilma C. Martin for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

ROGER P. MARQUIS,
WILMA C. MARTIN,
Attorneys, Department of Justice,
Washington 25, D. C.

DAVID L. BAZELON,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 9, 1947.

(Order of Submission.)

January Term, 1948.

Monday, January 12, 1948.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William J. Hotz for appellant, continued by Miss Wilma C. Martin, Attorney, Department of Justice, and concluded by Mr. William J. Hotz for appellant.

Thereupon, this cause was submitted to the Court on the printed record and the briefs of counsel filed herein.

[fol. 3] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 13,494.

Kimball Laundry Company, a corporation, Appellant,
vs.
United States of America, Appellee

Appeal from the District Court of the United States for the District of Nebraska.

[March 11, 1948.]

Mr. William J. Hotz (Messrs. Hotz & Hotz, Mr. William J. Hotz, Jr., and Mr. William F. Dalton were with him on the brief) for Appellant.

Miss Wilma C. Martin, Attorney, Department of Justice (Mr. A. Devitt Vanech, Assistant Attorney General, Mr. Joseph T. Votava, United States Attorney, and

Mr. Roger P. Marquis, Attorney, Department of Justice, were with her on the brief) for Appellee.

Before SANBORN, WOODROUGH, and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

The United States, in order to provide laundry and dry cleaning services for members of its armed forces, on November 21, 1942, filed a petition in condemnation under Section 201 of Title II of the Second War Powers Act of March 27, 1942, (c. 199, 56 Stat. 176, 177, 50 U.S.C.A. Appendix, § 632) to acquire the right to the temporary use and occupancy of the Kimball Laundry in Omaha, Nebraska, until June 30, 1943, and, at the election of the Secretary of War, from year to year thereafter during the emergency.[1] The Kimball Laundry was a large, modern, long-established, profitable and fully equipped laundry and dry cleaning establishment owned and being operated by the appellant, Kimball Laundry Company. The stock of the

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[1] The petition states:

"That the Secretary of War, pursuant to the authority in him vested by said Acts of Congress, has found and determined that it is necessary and advantageous, and to the interest of the United States to acquire by condemnation, under judicial process, for public use for military and defense purposes, the following described property, to-wit:

"The right to use and occupy the property known as the Kimball Laundry, owned and operated by the Kimball Laundry Company, a corporation, located at 1504 Jones Street, Omaha, Nebraska, consisting of the real estate known as the East 22 Feet of Lot 7, and all of Lot 8, Block 171, Original City of Omaha, and a strip one foot wide adjoining the aforesaid real estate on the North, all of said real estate being in the City of Omaha, Douglas County, Nebraska, together with the improvements situate thereon, and also all the personal property located thereon and therein, and used in connection with said laundry, excepting only the delivery equipment.

"That the estate sought to be taken for said public use of the aforesaid rights to use and occupy said property is a terminable estate ending June 30, 1943, and at the election of the Secretary of War for additional yearly periods thereafter for the duration of the present emergency as determined by the President of the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines."

Company and the management of its affairs were in the hands of the Jacobberger family.

The District Court granted the Government immediate possession of the laundry, and on November 22, 1942, it took over the entire plant, machinery and equipment (except delivery equipment), and, with A. L. Jacobberger (secretary and operations manager of the Company) as superintendent and about 95% of the Company's 185 employees, commenced operating the plant as a military laundry.

The Company, having no means of serving its patrons, went out of business for the duration of the Government's use and occupancy of the plant. The Secretary of War extended the term of occupancy for one year from June 30, 1943, and each year thereafter until June 30, 1946.[2]

A Board of six appraisers, appointed by the District Court in conformity with Nebraska practice, reported on November 19, 1943, "that the just compensation for the value of the use of the premises taken by the United States of America is the sum of $74,940 per annum, or the sum of $6,245 per month, and we find that said monthly rental was payable on the 21st day of each and every month, commencing on the 21st day of November, 1942, and that all delinquent monthly rentals shall bear interest at the rate of five per cent per annum until paid, to be paid said respondent, Kimball Laundry Company, by the United States

[2] The record shows that on May 11, 1943 the term was extended to June 30, 1944; that on June 19, 1943, the Government deposited in court $30,140; estimated compensation to June 30, 1943; that on April 6, 1944, the Government deposited $50,000, estimated compensation for the year ending June 30, 1944; that on May 31, 1944, the term was again extended to June 30, 1945, $50,000 of estimated compensation being deposited on August 10, 1944, to cover that extension; that the term was again extended on May 28, 1945, to June 30, 1946, and that on August 8, 1945, $65,000 of estimated compensation for that extension was deposited. The Company was permitted to withdraw the deposits of compensation without prejudice to its claims. The Government surrendered possession to the Company on March 23, 1946, after the termination of the trial of this case.

of America." The appraisers also reported that they recognized that at the time of the return of the property to the Company there would be damage for loss of patrons, but that a majority of the Board had found that the damage could not be appraised at the time their report was made. The Government and the Company both took appeals from the award of the appraisers.

The trial for the ascertainment of the "just compensation" due the Company began on March 4, 1946, before a jury, and ended March 19, 1946. The Company contended that the Government, while ostensibly taking only the right to use and occupy the laundry, had in legal effect taken all of the Company's physical assets and its business as well, including its trade routes and customers, and was obligated to pay the full market value of what was taken, estimated to be approximatey $1,000,000. The Company also contended that if the rental or use value of its laundry was to be used to measure compensation, evidence of the value of its trade routes and customers was admissible as an element of value.

The Government asserted that just compensation was to be measured by the market rental or use value of the laundry during the period in suit, plus the cost of restoring the plant and machinery to the condition in which they were on November 22, 1942.

The District Court was in accord with the Government's theory as to the proper basis for determining just compensation. The court's rulings and its instructions to the jury were in substantial conformity with that theory.

The jury by its verdict, filed March 20, 1946, determined that the compensation due the Company for the use and occupancy of its laundry for 3.6 years (November 22, 1942, to June 30, 1946) was $297,776.63, consisting of use or

rental value of $70,000 per annum, or $252,000 for the term, and $45,776.03 additional compensation for failure to return the property in the same condition as it was on November 22, 1942. Judgment was entered on the verdict. The court added interest at 6% (1) from November 22, 1942, until paid, on the amount adjudged due for the use of the laundry from November 22, 1942, to June 30, 1943, and (2) upon the amount due each year thereafter from the beginning of that year until paid, giving credit to the Government for the sums deposited as estimated compensation. Interest was also added from March 20, 1946, until paid, on the sum of $45,776.03 awarded for failure to return the property in the same condition as when taken.

On March 23, 1946, the Government returned the laundry to the Company, and on June 11, 1946, the Government paid into court $98,124.27, the amount required to satisfy the judgment. The Company was permitted by the court to withdraw $75,000 of this sum without prejudice to the Company's right of appeal.

For the purposes of this case, we shall assume, without deciding, that under § 258a of Title 40 U.S.C.A., the Company could accept $75,000 of the amount which the Government had deposited in court to satisfy the judgment, without waiving the right to challenge its validity.

In the Company's brief, "Points Relied upon for Reversal" are numbered from I to XXXII. They relate to the instructions of the court and to rulings with respect to pleadings and evidence. Most of them are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation. An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating

error is upon an appellant, and errors assigned, but not argued in his brief, are waived.[4]

In its brief, under the heading "Statement of the Case," the Company says:

"At the outset appellant believes this statement of the case would be lacking if counsel neglected to now state that errors are assigned principally for the failure of the court to permit the introduction of competent evidence as to the fair market value of the corporation assets as a going concern with its existing established trade routes at the time of taking on November 22, 1942, and to instruct the jury accordingly. Instead, the trial court took the position during the trial that just compensation should be measured only as interest at some per cent on the intrinsic value of the land, on the intrinsic value of the building, and on the intrinsic value of the machinery, and so instructed the jury, and excluded other evidence offered as to fair, reasonable market value. Evidence of estimated cost of repairing damaged property was permitted by government agents unfamiliar with the actual damages. The government did not repair or restore the damages to appellant's property. Its agents merely estimated what it would cost to place machinery, etc., again as it was on November 22, 1942."

It thus appears that the Company complains mainly of (1) the standards adopted for measuring just compensation, and (2) the evidence of the Government relating to the probable cost of repairing or restoring the damage to the plant and machinery attributable to the Government's use and occupancy.

The Company, in its brief, argues four "Propositions of Law." We shall discuss them in their order.

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[3] *Marin v. Ellis*, 8 Cir., 15 F.2d 321, 322; *In re Schulte-United, Inc.*, 8 Cir., 59 F.2d 553, 559; *Metropolitan Life Ins. Co. v. Armstrong*, 8 Cir., 85 F.2d 187, 195.

[4] *Denver Live Stock Commission Co. v. Lee*, 8 Cir., 18 F.2d 11, 13-14 and cases cited; *Shevenell v. Blackwood*, 8 Cir., 35 F.2d 421, 422; *American Ins. Co. v. Schauffler*, 8 Cir., 129 F.2d 143, 145.

The first proposition is stated as follows:

"When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the noncompensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence, known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

We cannot accept this proposition as the law. The Government took exactly what it purported to take, namely, the temporary use and occupancy of the Company's laundry. The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes or customers. No doubt the Government's occupation of the plant disrupted and damaged the Company's business, although it could hardly have destroyed the demand for laundry service in the city of Omaha or disabled the Company from ever re-establishing its business. If the taking of the temporary occupancy of the Company's laundry were to be given the effect of the taking of fee title to the laundry, it is certain that the damage done to the Company's business would not be compensable under the Fifth Amendment.[5]

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[5] *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378; *United States* v. *General Motors Corp.*, 323 U.S. 373, 379-380, 383; *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U.S. 266, 281-282; *Mitchell* v. *United States*, 267 U.S. 341, 345; *Joslin Manufacturing Co.* v. *City of Providence*, 262 U.S. 668, 675; *Bothwell* v. *United States*, 254 U.S. 231.

It cannot successfully be argued that the opinion of the Supreme Court in *United States* v. *General Motors Corp.*, 323 U.S. 373, contains implications that all consequential damages proximately caused by the taking of temporary occupancy of a building may be proved "not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use * * *" (page 383). This, because the Court also said in that opinion (page 383):

"* * * Proof of such costs [necessary costs to condemnee for removal of personal property, its storage and its return] as affecting market value is to be distinguished from proof of value peculiar to the respondent [condemnee], or the value of good-will or of injury to the business of the respondent which, in this case as in the case of the condemnation of a fee, must be excluded from the reckoning."

In the case of *United States* v. *Petty Motor Co.*, 327 U.S. 372, which involved the taking of the leaseholds of tenants in addition to taking the temporary use of a fee, the Court, in distinguishing that case from the General Motors case, said (p. 379-380):

"* * * There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. * * * Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by *evidence of the cost of temporary removal.* [Italics supplied.]"

In the instant case, had the Government taken the temporary use of the building alone, and had the Company been required to remove its machinery and equipment, and to store them and then return them to the building at the end of the Government's term, the necessary cost of so do-

ing, as bearing on the question of the market value of the use and occupancy taken, could, no doubt, have been proved and considered.

Where the right to temporarily use and occupy property is the interest taken, just compensation is the value on the market of the use and occupancy (*United States* v. *Petty Motor Co., supra*, page 377), but evidence of loss of profits, damage to good will, and other such consequential losses must be excluded in determining market value. Id., pages 377-378.

The compensation contemplated by the Fifth Amendment is the market rental value of the temporary use and occupancy taken. *United States* v. *General Motors Corp., supra*, pages 382-383 of 323 U.S. In effect, the Government takes a lease and is obligated to pay as rent the full market rental value of the property occupied. In addition, the owner, as the constructive lessor, is entitled to additional compensation for any destruction, damage and depreciation in value of the property occasioned by its temporary use. Id., pages 383-384. The Government, as the constructive lessee, obligates itself to return the property in as good condition as when received, "ordinary wear and tear and damage by the elements alone excepted."

The District Court did not err in excluding evidence as to the value of the Company's trade routes and customers or going business.

The Company's second "Proposition of Law" is as follows:

"Where the trial court rejects or receives evidence which adversely affects a substantial and material right of a party litigant, the cause should be reversed and remanded."

Under this proposition, the Company states that witnesses were permitted to testify who did not see or know

the property as it was in 1942, and knew nothing of its value at any time; that the formula used by the Government's witness Weber formed no adequate basis for determining just compensation; that there was competent evidence of fair rental value, but that it was nullified by the court's instructions.

The District Court's charge is not a model of conciseness or accuracy. It contains statements which standing alone are subject to criticism, such as: "With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. We must approach it, however, from such evidence as we can obtain." Taking the charge as a whole, however, we think it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry.

The market rental value of the laundry and the damage and deterioration resulting from its use by the Government

had to be estimated. There was no actual market for the temporary use and occupancy of laundries. The men employed by the Government to estimate rental value and damage to machinery and equipment were competent and qualified to do that work. Their testimony was admissible. Their credibility, the weight of their testimony, and the soundness of their opinions were for the jury to evaluate. *Svenson v. Mutual Life Ins. Co. of New York*, 8 Cir., 87 F.2d 441, 445, and cases cited. "After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination." *Montana Railway Co. v. Warren*, 137 U.S. 348, 354. Whether an expert witness is qualified to testify is primarily a question for the trial judge, whose determination can be upset only for an abuse of discretion. *Love v. United States*, 8 Cir., 141 F.2d 981, 983, and cases cited. The fact that many of the Government's experts on value or on damage to equipment and machinery had not seen the laundry in 1942 did not disqualify them to testify to their estimates of its value at that time. They had heard the condition of the plant and machinery fully described, and assumed that it was in either good or first-class condition at the time the Government took over.

The Company's "Proposition of Law No. III" is:

"The conduct of a case in condemnation under the federal statute shall be governed by the laws of the state in which the condemned property is located."

The contention made is that loss to a business occasioned by a taking of property under the power of eminent domain is compensable in Nebraska. What constitutes property and what is just compensation under the Fifth Amendment is not a question of Nebraska law, but of federal law. *State of Nebraska v. United States*, 8 Cir., 164 F.2d 866, 867, 868.

The Company refers also to the refusal of the court to permit the introduction, in rebuttal, of evidence proffered to show that the estimates of Government witnesses as to the amounts required to restore the laundry to its former condition were too low. The testimony rejected was a part of the Company's main case. The order of proof on a trial is largely within the discretion of the trial court. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Peters (39 U.S.) 448, 462-463; *Wills v. Russell*, 100 U.S. 621, 626; 53 Am. Jur., Trial, §§ 115, 116, pages 101-104. There was no such abuse of discretion in rejecting the Company's proffered evidence as would warrant a reversal.

The Company's "Proposition of Law No. IV" is as follows:

"When payments for just compensation are delayed, 'additional' compensation measured by 6% of the total amount ultimately found due from the date of the taking must be as a matter of law added to the judgment, with credit for the amounts paid with 6% added to date of ultimate judgment."

Section 258a of Title 40 U.S.C.A. provides: "* * * and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court." The Company contends that, since the ultimate award was $297,776.03, interest should run at 6% on the entire amount from November 22, 1942, until the date of payment of the judgment, without including, however, interest on sums deposited as estimated compensation.

The question presented is not free from doubt. From a realistic viewpoint, what the Government took on Novem-

pellant, Kimball Laundry Company, will be submitted for review by the Supreme Court of the United States. Appellant will petition the Supreme Court of the United States to grant a writ of certiorari, as the appellant in good faith believes that its property has been taken by the condemnor without just compensation as provided in the Fifth Amendment to the Constitution of the United States and the federal statutes enacted in pursuance of the said constitutional provision.

2. This application for stay is based upon Section 8 (a) (b) (d), 43 Stat. 940, being Section 350 of the Judicial Code found in 28 U. S. C. A. 1947 Cumulative Pocket Part, page 138.

3. Surety company bond is on file to guarantee all costs on appeal, and in addition thereto there is on deposit with the Registry of Court in the office of the Clerk of the United States District Court at Omaha, Nebraska, in this cause [fol. 19] ample cash as the property of the appellant, Kimball Laundry Company, to protect against all costs and expenses that might ultimately be taxed to the said appellant, Kimball Laundry Company, in this cause.

4. Said Kimball Laundry Company, a corporation, the appellant, will be the petitioner for said writ of certiorari, and this stay is requested in accordance with Rule 16(c) of the United States Circuit Court of Appeals for the Eighth Circuit and is requested for a period of thirty days. During said period of time there will be filed with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit a certificate from the Clerk of the Supreme Court of the United States that the petition for writ of certiorari, record, and brief have been filed. The petitioner herein will correspond with the Clerk of the United States Circuit Court and place with him such deposit as may be required in pursuance of Rule 17(c) and (e) in due time and within said thirty day period, in order that the Clerk may be fully compensated for costs as in such cases made and provided.

5. This application is made in good faith and not for the purpose of delay, and is for the purpose of obtaining a reversal of the opinion and judgment of the United States

Circuit Court of Appeals for the Eighth Circuit above referred to.

Dated at Omaha, Nebraska, this 24th day of March, 1948.

KIMBALL LAUNDRY COMPANY,
Appellant,
By William J. Hotz, Its Attorneys.

Hotz & Hotz,
William J. Hotz, Jr.,
William F. Dalton.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 25, 1948.

[fol. 26] (Order Staying Issuance of Mandate.)

March Term, 1948.

Thursday, March 25, 1948.

On Consideration of the motion of Appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court, that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days, there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 25, 1948.

(Application for Additional Stay of Issuance of Mandate.)

Western Union.

April 16, 1948.

E. E. Koch,
Clerk, U. S. Circuit Court of Appeals,
St. Louis, Mo.

Please consider this wire application for an additional fifteen days from April Twenty Fourth for staying of

Mandate in Number Thirteen Four Ninety Four, Kimball [fol. 21] vs. United States. We have excellent cause for request if such showing necessary. Federal Statute grants us Three Months from March Eleventh to file Petition for Writ. Therefore we assume your Rule Sixteen C does not preclude Circuit Court from granting the additional fifteen days herein applied for. Please advise by Wire.

WILLIAM J. HOTZ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 17, 1948.

(Order Further Staying Issuance of Mandate)

March Term, 1948.

Saturday, April 17, 1948.

On Consideration of the application of appellant for a further stay of issuance of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for a period of fifteen days from and after April 24, 1948, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supeme Court.

April 17, 1948.

[fol. 22] (Clerk's Certificate)

United States Circuit Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript consisting of four volumes contains printed record filed on July 2, 1947, composed of three volumes, Volume I consisting of pages a to 180, in

clusive, Volume II consisting of pages 181 to 460, inclusive, and Volume III consisting of pages 461 to 868, inclusive, on which the appeal from the District Court of the United States for the District of Nebraska was heard in said Circuit Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, composed of one volume, Volume IV, consisting of pages 1 to 22, in a certain cause in said Circuit Court of Appeals wherein Kimball Laundry Company, a Corporation, was Appellant, and the United States of America was Appellee; No. 13,494.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 26th day of April, A. D. 1948.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 23] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duty certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the
Supreme Court of the United States

OCTOBER TERM, 1947

NO. 830

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In the
Supreme Court of the United States

OCTOBER TERM, 1947

NO. 830

KIMBALL LAUNDRY COMPANY, A Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO: THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Kimball Laundry Company, a corporation of Omaha, Nebraska, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, Eighth Circuit, to review the decision of said court

rendered March 11, 1948, affirming a judgment of the United States District Court for the District of Nebraska given in a condemnation proceedings wherein the petitioner's laundry and dry cleaning plant was totally taken for Army military purposes on November 21, 1942. The case was tried to a jury on March 4-20, 1946. On March 22, 1946, the Army declared the property surplus and abandoned it to the petitioner. The government prevailed in limiting its liability for 3.6 years, measured by interest on its appraised value of land, building, and machinery, plus its estimate of the costs to replace certain broken parts of the building and machinery. The petitioner as owner and operator was denied all of the measures for compensable damage which it offered to prove, as hereinafter set forth.

THE OPINION

The opinion dated March 11, 1948, sought to be reversed is Kimball Laundry Company, a Corporation, appellant, versus United States of America, appellee, Civil No. 13494, found in Vol. IV of the certified record (166 F. 2d 856, May 10, 1948).

JURISDICTION

The Court has jurisdiction to review said decision under Section 240, Judicial Code (28 U. S. C. 347a).

THE STATUTES INVOLVED

The statutes involved are copied in the appendix (App.) to the appellant's brief (Aplt's. br.) filed in the Circuit Court and certified with the record (Vols. I, II, III, IV) now before this Court (Aplt's. br., pp. 1-15). They are:

28 U. S. C. § 391 (Judicial Code, § 269).

40 U. S. C. § 257, 258, 258a. Fed. Rules 81a (7).

50 U. S. C. § 171; 171a; 621; 632; 636, amending 721; 636a, further amendments; 721; 722 (providing methods to pay government upon return of property to owner; 775; 776.

Fifth Amendment to Federal Constitution on "just compensation."

Constitution of Nebraska, Art. I, § 21 (Vol. II, Rev. Stat. Neb. 1943, on "just compensation." (Aplt's. br., App. 13).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

EXPLANATION: The footnotes where indicated direct attention to the points relied upon for reversal, and where the point is discussed and argued as error in appellant's brief in the circuit court. By stipulation of counsel when the record on appeal was prepared, the points relied upon for reversal were placed in the appellant's brief rather than in the record (Vol. I, 142). Thus the brief becomes a part of the record for review to that extent and the limited pages for brief and argument were thus curtailed.

However, contrary to the statement in the opinion of the circuit court (Vol. IV, 61), each point relied upon for reversal was discussed and argued in appellant's brief (Aplt's. br., pp. 14-88), followed by the supporting propositions of law (Aplt's. br., pp. 89-126). Thus the necessity of reference to appellant's brief.

1. The petitioner, Kimball Laundry Company, is a Nebraska corporation. It owned the fee title, free from liens, to all the real estate. Its personal property was free from liens or claims. It was using all its facilities,

as a going concern, to operate an exceptionally large laundry and dry cleaning establishment in Omaha, Nebraska. It was neither the lessee nor lessor of any of the property involved. It had the "temporary use" of none of its real or personal property for any purpose.[1] This was the condition on Saturday, November 21, 1942, the day on which the petition in condemnation was filed in the United States Court.[2] The Army Quartermaster Corps took complete possession the following day of all petitioner's plant with all its facilities, machinery, and equipment. The petitioner was, by force of the taking, put out of business.[3] The Army continued without interruption the operation of the plant with petitioner's 180 employees and managerial staff. Soon prisoners of war (100) replaced the skilled employees.[4] The Army serviced for pay the laundry and dry cleaning requirements of the soldiers, officers, and all the Army hospitals, training centers, and forts in the Seventh Service Command from this property (Vol. II, pp. 447-8).

2. The Army was admittedly in the continuous, uninterrupted possession and operation of the property to the exclusion of the petitioner herein from the time of the taking up to the day that it was declared surplus and abandoned to the petitioner two days after the jury's

1. Complete word picture of plant, Vol. I, 273-285. Previous 5 year audit to show value, Vol. I, 282. Rejected by the Court.

2. Pet., Vol. II, pp. 273-285. Condemns "right to use and occupy" p. 2. Also right to use and occupy—"all personal property—used in connection with said laundry." Order of taking recited—"prior to taking over business of said property." Vol. I, 11; and taken for—"the establishment of a military laundry located in the city of Omaha—." Vol. I, 17.

3. The Court rejected the Evidence of the President of the Company that it was completely driven out of business as immaterial. Vol. II, 437-9. Error discussed Aplt's. Br. XIX, p. 61.

4. Vol. II, 266-270. Prisoners of war (100) by replacing skilled employees added to the destruction of the machinery and equipment.

verdict on March 29, 1946 (Vol. I, 97), when said property was "found and declared to be surplus as of March 23, 1946."

3. When taken, the company was doing an annual gross business of approximately $400,000.00. Financial statements showed a continual growth in volume and income since 1933.[5] It was one of the most efficient and expensively equipped laundries west of Chicago.[6] Its building taken was built of steel and concrete, five stories, 132 feet square. Its business was obviously that of a servicing corporation for those who required such services. It sold no merchandise; it manufactured none. Its value depended upon the services performed. Its gross income since 1924 was $6,728,454.64.[7] The audits showed what part of this went into the plant, to build and develop the assets and trade routes.[7] The cost of the machinery and equipment at the time of the taking in 1942 was $405,294.84.[8] Its appraised value at that time was $273,831.39, and the same men in 1945 appraised it at $120,699.75.

5. All these Certified Public Accountants' evidence and exhibits were rejected save one column showing volume that was of no value without the complete audit. In a Servicing Company the business results are necessary to arrive at value besides the "brick and mortar." Vol. II, Ex. 1, p. 190; Ex. 2, p. 193; Ex. 3, p. 200; Ex. 4, p. 204; Ex. 5, p. 206; Ex. 6, pp. 214-18; Ex. 7, p. 221.

Error in rejections, Aplt's. br. VII, pp. 28-33, where each exhibit is discussed fully, with Court's ruling by page reference to record, if not recopied. In the Propositions of Law these exhibits and testimony are argued and further discussed, Aplt's. br., p. 95, 119, as to $400,000 business Vol. II, pp. 199-200.

6. Vol. II, p. 401; 396-401.

7. C. P. A.—Hilmer's testimony of Exhibits, Vol. II, pp. 199-221 (rejected; cf. footnote 5 above.)

8. Vol. II, pp. 245-262, Ex. 21-3, p. 266. Shows value of machinery and equipment in 1942, and by same witnesses in 1945 before the trial. Difference in value—$153,131.54. This evidence was taken from jury by Court's instructions. Error discussed Aplt's. br., p. 39, IX, argued under Propositions of Law, p. 143. It will be seen by the references that such measure of damages was denied consideration by the jury. Vol. I, pp. 152-165.

The cost of the building at the time of the taking was $205,035.12. The reproduction value of the building with an additional story was, on November 21, 1942, $280,348.00.[9] The power equipment was valued when taken at $62,928.08.[10] The land upon which the building and equipment stood was valued at $30,000.00. Its location was in downtown Omaha.

Building	$280,348.00
Machinery and equipment	273,831.39
Power equipment and incidental installations	62,928.08
Land	30,000.00
Customers routes	340,516.85
Total	$987,624.32[11]

(Rejected)

4. To permanently establish itself by the expense of acquiring trade routes, men had been employed to contract with various families and commercial houses throughout the City of Omaha for laundry and dry cleaning services. These men during the previous five years built up for petitioner 15,093 regular trade route customers, all of which were being serviced on November 21,

9. Vol. II, Ex. 19, p. 264.

10. Vol. II, Ex. 23, pp. 272-3. This before and after valuation of power equipment was denied consideration by the jury in the Court's Instructions. cf. Aplt's. br., pp. 15-21. Instructions requested but not given, pp. 21-26. Interest on "brick and mortar" values alone were permitted for the jury's consideration. Argued under Prop. Law I and II. Aplt's. br., 89 and 109.

11. Aplt's. br. XIII, pp. 44-48. Vol. II, pp. 273-9; Court ruling, Vol. II, p. 315. All rejected by Court except land, building and machinery for interest on investment as only measure of damages as shown by all the Court's Instructions. Vol. I, pp. 150-165; Exceptions 165, 167; Petitioner's Instructions requested but not given, 172-178. Assigned and discussed, Aplt's. br., pp. 15-26. Argued, Prop. Law I and II—89, 109.

1942. Under the contract made by the petitioner, the laundry and dry cleaning was picked up without further consent, and when serviced was returned without further contract or agreement between such persons and the company. There were 1500 desk customers who were thus personally serviced. There were 4648 special customers who required special services at times throughout the year. There were 20,802 customers who from time to time sent in table linen, spreads, rugs, comforts, blankets, and lace curtains. These persons aggregated 42,043, called by the trade "trade route customers." There were no duplications in the figure. The petitioner paid to these route men to build and keep these routes during the said five years previous to the taking, $237,654.83, in guaranteed salaries and commissions.[12] This was the principal but not the only item of expense to keep and maintain the routes against the competition from other laundries who likewise had route men at work on guaranteed salaries and commissions. These routes (similar to a newspaper's circulation) had a market value in the trade of $340,516.85. These were worth by trade practices as follows: $20 for each of 15,093 trade route customers; 50c for each of 4648 pillow customers; 50c for each of 6810 table linen customers; 50c for each of 5814 rug and blanket customers; 50c for each of 8178 lace curtain customers; $10 for each of 1500 call customers; and for 44 commercial customers which produced $34,253.13 revenue for 47 weeks during 1942, such as hotels, railroads, clubs, etc., evaluated in the trade at $728.79 per week at 15 times the

12. Vol. II, p. 244; p. 234 shows itemization of gross income past five years. $400,000 for 1942. McDougal, Vol. II, p. 244. Ex. 13 refused. Error VIII, pp. 33-38, Aplt's. br. argued. Prop. Law II, p. 109.

weekly amount, thus providing the said total of $340,516.85 as the value of the trade routes at the time of the taking.[13] These were totally destroyed by the taking and retention of the property by the Army for three years, seven months, and eight days.[14]

5. The Certified Public Accountant's reports proved that no sums were carried for good will, trade name, advertising, or anticipated profits, future business or estimates of the value of the business. Only the real and personalty valued as tangible assets were shown of record. Obviously these audits contained no evaluation of the trade routes[15] as good will.

6. By expert testimony based upon experiences and fully itemized was given in exhibit form the cost to build up again in the City of Omaha these trade routes, giving credit that during the first year the gross income would be $100,000, while the total expense for that period would be $251,680.00, which, after figuring income, would show a net operating loss at the end of the first year of $151,680.00. For the second year the gross income would be $150,000.00 with an expense of $280,366.80, or an operating loss the second year of $130,366.80. For the third year there would be a gross income of $200,000.00 with an expense item of $330,483.20, and an operating loss of

13. The witness Judd qualified as an expert to give these trade route values as a matter of trade practice. The court denied all consideration of them either as separate items or as a part of the value in 1942, or for any purpose whatsoever. Vol. II, p. 367; Ex. 14, pp. 370-1.

14. Vol. II, pp. 437-9. Error predicated on rejection argued p. 89. Add'l. br. 61, XIX; Vol. II, p. 237. Explanation of Ex. 11.

15. Vol. II, p. 200 C. P. A.—Hillmer stating, "These items which were a factor in getting the increased business have been charged to expense and have not been capitalized as good will."

$130,483.20. In the fourth year the company should be able, then, to operate without further losses and build up its net income. But for the three years the net cost to re-establish its laundry and dry cleaning routes with the plant and facilities to be maintained and operated while so doing would be $411,450.00,[16] or a loss of that sum.

7. The building previously valued at $280,348.00 and the land at $30,000.00 were declared surplus after 3.6 years and abandoned to the petitioner. The power equipment and incidental installations were rendered useless or destroyed to such an extent that by orders of the Army commanding officers the plant was declared a danger to human life because of the unsafe condition of the boilers except for limited use at the time of surrender.[17] This power equipment was valued at $62,928.08 at the time of the taking and $35,260.53 at the time of trial, or a loss of $27,667.55 on such items.[18]

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16. Vol. II, pp. 372, 376, 380. All this evidence was rejected, with the trade route values, as not within the issues. Nevertheless in the opinion of the Circuit Court the statement is made wholly without foundation and contrary to the above offered proof at Vol. IV, p. 8. "No doubt the government's occupation of the plant disrupted and damaged the company's business, although it could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business." This important part of the opinion erroneously infers that the evidenced cost to rebuild the routes, and the time it would take, and their value, when destroyed by the taking, were absent from the recorded testimony. If the topics were important enough for the Circuit Court to comment upon, it would seem the District Court should have permitted the jury to receive the evidence for consideration in arriving at its verdict. Furthermore, if the Circuit Court wished to pass upon the subjects it should have done so based upon the competent evidence offered in the record as above indexed. Aplt's. br., p. 53, Error XVI and discussion.

17. Vol. II, pp. 310-11, Ex. 22-A, warning by command Major General Craig. Vol. II, pp. 297-8. This offer to prove the laundry could not be operated at all in its condition invoked this trial Court's remark, "I can go down and operate one by myself, and I don't know anything about a laundry." This remark was obviously highly prejudicial and contrary to all the evidence. Error discussed Aplt's br., XII, p. 43, Prop. of Law III.

18. Vol. II, p. 273.

8. The building had structural damage thereto from the overloading of boilers, causing shaking and from rough usage necessary in the rush to get out the vast amount of work. The very finest of expert testimony of petitioner's witnesses gave detailed cost of the repairs to the building to place it in the condition that it was at the time of the taking at $53,970.00,[19] thus reducing the value of the building from $280,348.00 to $226,378.00, exclusive of painting or repairs to plumbing, heating, boilers, power plant, etc. The painting necessary after the 3.6 years was estimated at $17,281.00[20] by the best of expert painting contractors, thus reducing again the valuation of the building by such amount under this plan for determining the damage.

9. Thus it might have been argued to the jury from the evidence, had it been received, that the building was valued, when returned, at $280,348.00 less $53,970.00 and $17,281.00, or $209.097.00; the machinery and equipment at $120,699.75;[20.1] the power equipment and incidental installations, $35,260.53; the land remaining at the same value of $30,000.00; the customers' routes, totally destroyed by the taking. These items aggregate $395,057.28, or a difference in the valuation of the property of $987,624.32 when taken, and $395,057.28, when returned, or a loss to petitioner of $592,567.04, based upon the undisputed evidence on the before and after values. The following tables illustrate the difference:

---

19. Peter-Kiewit, Vol. III, p. 831; Ex. 53, p. 835.

20. Vol. III, p. 823, Ex. 52, p. 829 (Steinheimer).

20.1 Vol. II, pp. 245, 262; Ex. 21-3, p. 269. Rejected by Instructions, Vol. I, pp. 157-162. Assigned as error and discussed Aplt's. br., pp. 82, 83, 87; also p. 39; Prop. of Law I and II, pp. 89, 109.

Date of taking Nov. 21, 1942.		Mar. 23, 1946 Date of return.
Land	$30,000.00	$ 30,000.00
Building	280,348.00	209,097.00
Power equipment	62,928.08	35,260.53
Mach., equip.	273,831.39	120,699.75
Route values	340,516.85	none
	987,624.32	395,057.28

Petitioner's Loss on before and after value	$592,567.04
Verdict under the court's instructions	297,776.03
Additional compensation denied	$294,791.01

10. The capital stock was owned by Harry A. Jacobberger, his brother, A. L. Jacobberger, and a son of Harry, Frederick, and their families. Each had spent his life in the laundry business. Frederick became a major in the United States Army in charge of the government laundry at Camp Carson, Colorado, and qualified as an expert with unusual experience. A. L. Jacobberger offered to prove that the laundry had a fair, reasonable, market value as a going concern on November 21, 1942, of $987,624.32. This was denied him.[20.2] For the purpose of verification and explanation of the composite value, exclusive of any value for good will or trade name, he offered to prove and corroborate the evidence of other witnesses as shown in the table supra, page 6.

11. The jury's verdict[21] for the use was $252,000.00, which is exclusive of the $45,776.03 returned under the

20.2. Vol. II, pp. 312-31[illegible]

21. Vol. I, 96; 97.

instructions of the court on the damage to physical property suffered by the petitioner.

12. Assuming that all other losses were included in the difference in the values of the property in 1942 and 1946 as $592,567.04, it is apparent from the evidence that should have been submitted to the jury, under proper instructions, that the verdict might readily have resulted in the sum of $592,567.04 rather than the verdict of $297,776.03 which was based on the evidence as limited by the trial court. (Vol. I, pp. 157-162).

13. The court, by ruling out all the evidence as to the value of the plant as a going concern on November 21, 1942, either for the purpose of showing the basis for determining use or for the purpose of showing before and after value to determine proper pay for use,[22] denied petitioner substantial rights.

14. If the government's witnesses were permitted to testify that the proper measure of damages was the isolated value of the building, the isolated value of the machinery and the land, and to figure a percentage of interest thereon as the government's theory, and accepted by the court, then most certainly the court should have permitted the petitioner's offsetting evidence of what it considered the fair, reasonable "rental" value of the property when offered by the petitioner. This was denied directly or nullified by the court's instructions. The court for all intents and purposes instructed the jury to disregard everything that the owners had stated as to values for temporary use.

22. Vol. II, pp. 315-6; Error Aplt's. br. XIII, pp. 44-6. Argued under Prop. Law I, Aplt's. br., pp. 89, 92, 103-108-9.

and left for the jury only the testimony of the government inexperienced witnesses (Vol. I, pp. 157-162).

15. At the very outset of the trial the court struck the answer of the petitioner (Vol. II, 183). The court refused the applications previously made for a pretrial hearing (error assigned and argued Aplt's. br., V, 26), and failed to enter any order or direction as to the method or manner of proof for the measure of damages, but the court stated, "in a sense we are plowing new ground, trying to arrive at a reasonable basis to afford the * * * owners just compensation under the Constitution." (Vol. II, 262-3.) Consequently, the petitioner, opening the trial, took the position that the fair, reasonable market value of the property at the time of taking would be proper for all purposes in the trial. This the court denied and either refused to hear or ruled out on instructions to the jury evidence of the value when taken for all purposes, as hereinabove clearly set forth and indexed in the footnotes, supra, p. 6.

16. Then the petitioner sought to show the fair, reasonable compensation for the use of the premises during the period because the court repeatedly so ruled. These "use" sums given by Harry A. Jacobberger, A. L. Jacobberger, and Fred Jacobberger were $600,000, $570,000, and $570,000 respectively.[23] Those figures included

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23. A. L. J., Vol. II, 348-367; After 50 pages of examination to substantiate $570,000 as just compensation for the use, including all damages except to trade routes and business, the court said it would withhold ruling. Vol. II, 331—"We will take your motion (to strike the testimony of the owner) under advisement." Further at the close of the testimony, Vol. II, 367—"I will instruct the jury with reference to these items when the time comes." Later the court's instructions nullified the evidence, Vol. I, 155-165. Aplt's br., Exhr XIV, 48 discussed. Instructions, Aplt's. br., pp. 15-26. Argued, Prop. Law II, p. 111, Aplt's. br., Vol. I, pp. 172-8.

all items of compensation except damage to trade routes, business, and good will. Nevertheless, the evidence was excluded under instructions of the court (Vol. I, pp. 157-162).

17. In each instance, as shown in footnote 23, the court either ruled out the testimony or by specific reference to each of the three owner-witnesses renounced their testimony so completely that the jury were left with no practical solution but to find as desired by the government witnesses.

18. There were three principal government witnesses:

(a) C. R. Crowder, who never used, bought, or sold laundry machinery and equipment, nor was he familiar

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Harry J., Vol. II, 421-3; 441-3. The court assumed without cause the witness's estimate of $600,000 for the term included damages for trade route destruction, good will, and loss of business. So under such erroneous impression the testimony was nullified. Vol. II, 421-443. Error assigned. Aplt's. br. XVII, p. 54; argued under Prop. Law II.

Fred J.—unusual qualifications as Army Major in charge of Army laundry at Camp Carson, Colorado, and Jefferson Barracks, Mo., Vol. II, 443-58. His testimony re use compensation, $570,000 for 3.6 years, Vol. II, 454-5, excluded "loss of customers, routes, loss of business, or good will." Vol. II, 458-9. Ruling of court on objection was, Vol. II, 460, "I will intruct the jury on these items when the proper times come." Inst., Vol. I, pp. 157-162 and Inst. denied, Vol. I, pp. 172-8.

Aplt's br., Error XX, p. 63. Instruction of court specifically renouncing the witness Fred J., Vol. I, 157; renouncing A. L. J. testimony, Vol. I, 156; renouncing Harry J. testimony, Vol. I, 156. Errors, Aplt's. br., XVIII, p. 56; XIV, p. 48. Briefed and argued Prop. Law I, 89; II, 110. If the itemization of what the owners had in mind to base their "use" compensation contained items not compensable as the trial court viewed them, the specific items should have been ruled out rather than the denunciation of the court finally saying, after the above comments (Vol. I, 157), "With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *" Next the court said in his instructions, Vol. I, 159, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate." Aplt's. br., Errors I-H, p. 18, and I-J, p. 19. Also errors on refusal of instructions: Aplt's. br., Error III, p. 21-5.

The court, by giving the instructions IV-b requested by the government, committed reversible error in a condemnation suit, because the jury

with such property or the plant in 1942 (Vol. III, p. 656); was one of the assistants in the office of the Army Engineers. He went about the city to pick up information here and there about cost of repairs and replacements of such machinery and equipment. He was not a contractor or builder's architect. He was permitted over objections to testify, and compiled his own hearsay exhibits, 594 of them (Ex. 17—objection, Vol. III, 634-5), which were received as "official government documents," and so volunteered by the trial court to the jury (Vol. III, p. 648). Mr. Crowder stated that the cost to restore the entire building, painting, and all else would be $37,521.34 (Ex. 17; III, 692); that it would cost $20,471.27 to restore the machinery where it was in 1942, less ordinary depreciation, including excessive use (Ex. 18; III, 641); and $1,750.40 (Vol. III, 654) for other items of replacement. His estimates total $59,743.01. No other figures were offered by either side that were less than this amount for the restoration of the building and the equipment, power plant, etc. Nevertheless, without evidence from any source, the jury found that this total damage was $45,776.03. ("Rental" $252,000; all damages, $45,776.03; total judgment based on jury's verdict, $297,776.03.) (Vol. I, 95-6.)

(b) Witness Weber (Vol. III, 735-7) who never ran a laundry, who never bought or sold laundry machinery or equipment, and was not a laundryman, stated as a

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were told to disregard evidence that did not appear anywhere as evidence during the trial. Error, Aplt's. br., pp. 25-6; Vol. I, 164. These were: "interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily * * *." Argued and briefed, Prop. Law III. Aplt's. br., p. 124, stating: "The conduct of the trial must be proper, or reversible error results." Citing 144 Neb. 325, 329-333, 13 N. W. 2d 168. Circuit Court rule limiting pages to 85 stopped further discussion, but the error is obvious and elementary.

professional appraiser[23.1] for the government (III, 736) that the total rental for the 3.6 years should be $70,000 per year, or a total of $252,000. That was exactly the sum the jury found. Under the form of the Exhibit 22 (Vol. III, 735) and the court's instruction (Vol. I, 159) that interest on separate items would produce a proper result, no other conclusion was left for the jury.

(c) Lewis D. Sholes, for the government, a real estate man who never bought or sold any laundry machinery or equipment, never operated a laundry, was permitted to testify that the annual rental, including excessive use, should be $65,663.00 per year, plus additional costs of restoration above normal depreciation of $16,680.00. Mr. Sholes' total of all compensation was, for the period $253,066.80 (Vol. III, pp. 775-8; Ex. 24, 776; 779; 780; 783-4).

19. In the opinion of the circuit court (Vol. IV, 14) the court said, "The jury's verdict was well within the evidence. While the total award was much less than the amount claimed by the company, it is exceeded by about $40,000.00, the highest estimate made by any government expert witness."

20. It will be seen by a careful analysis of the exhibits above referred to and which were received in evidence over objection, that the jury's verdict was less than the estimate for restoration made by Mr. Crowder ($59,543.01) by approximately $15,000.00. The verdict for the

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23.1 Vol. III, pp. 723; 725; 728-9; 735-7; 744; 747; 749; Ex. 23, 750; Ex. 22, 735.

"rental" was that fixed by the witness Weber ($252,000.00) and almost identical with the total sum for all purposes fixed by the witness Sholes for the government.

21. Under the instructions of the court for all practical purposes the jury was denied the right to consider any evidence of the petitioner's witnesses generally.[23.3]

22. Error has thus been committed, and substantial justice has been denied as hereinabove shown by proper reference to the record (Aplt's. br., 14-88).

23. All the foregoing were set up as points relied upon for reversal and each was specifically argued and discussed therein (Aplt's. br., 89-128). By stipulation of counsel the points relied upon for reversal were set up in the brief instead of in the record (Vol. I, 142). Each was discussed and argued under the propositions of law (Aplt's. br. 89-128).

24. The references made in the footnotes should suffice as proof of the assertions that the circuit court had before it sufficiently the points, their discussion and the legal arguments upon them. However, under Proposition of Law No. III pertaining to the conduct of a trial under Nebraska state law in reference to pleadings and trial procedure for lack of space (brief limited by Circuit Court rule to 85 pages was extended to 125); "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605, 77 N. W. 120), although properly in the main case." The point was discussed under points XXX, XXXI, XXXII, Aplt's. br., pp. 82-8 (Ex. 52, III,

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23.3 Vol. I, pp. 157-162.

829; Ex. 58, III, 835; Ex. 55, III, 847). All the evidence in rebuttal (save Dahlquist's on repairs to machinery) was rejected by abuse of discretion. It was offered to meet the testimony of Mr. Crowder for the government. It was proper rebuttal under the plan of procedure adopted by all courts. The unfair result to petitioner may be concluded from the following table taken from record heretofore given (Supra, 5; 9-10):

Govt. witness Crowder's estimates for restoration of damages to structures.		Petitioner's witnesses rejected except Dahlquist.		
Bldg. & Painting	$37,521.34	Bldg. (Kiewit)	$53,970.00	Rejected
		Painting (Steinheimer)	17,281.00	Rejected
Machinery	20,471.27	Boilers (Hanighen)	21,678.00	Rejected
		Boilers	6,183.00	Rejected
Replacements	1,750.40	Mach. & Equip. repairs (Dahlquist)	34,309.42	Received
(Received)	$59,743.01		$133,421.42	

25. The Jury's verdict for restoration damages was $45,776.03. The petitioner, of course, could not argue to the jury any item to contradict Crowder except Dahlquist's $34,309.42 by virtue of the rejecting of these exhibits and testimony by the court as above shown.

26. The Federal Rules of Civil Procedure [81 (a) (7)] exclude procedure in condemnation trials, and 40 U. S. C. § 257-8 (g) (appendix to Aplt's. br. pp. 4-6) specifically provides that in questions of procedure the state practice shall be followed. No substantial right would have been denied the government by the admission of

the testimony of the witnesses Kiewit, Steinheimer, and Hanighen in rebuttal to Mr. Crowder's. These were reputable men in their respective lines of business. They wholly discredited witness Crowder's statements.

Written pleadings are required under the Nebraska practice. The court struck all of petitioner's answer (Vol. II, 183). (Vol. III, pp. 823; 828-9; 831-8; 847.)

27. The trial court reversed itself by first stating rebuttal would be allowed petitioner because as the trial proceeded, petitioner offered evidence of before and after values, offered evidence of total values at time of taking for purposes of use value; then to meet the court's theory offered evidence of use value all as above related. This evidence was all either denied at the time of offer or substantially ruled out by the court's instructions. Consequently, when the restoration costs of $133,421,42 were offered in rebuttal to meet the Crowder testimony of $59,743.01, and rejected, a grave error of indiscretion occurred. It was not merely procedural irregularity (56 Neb. 600, 77 N. W. 120). Under 28 U. S. C. § 391; Jud. Code § 269, as interpreted, the ruling out of any competent testimony affecting substantial rights of one party gives grounds for examining the entire record and granting certiorari to see that justice is done if the facts warrant. (Vol. III, pp. 812; 815; 826-831; 831; 833-835; 847; 857-9; 863.)

This table may be used to illustrate the basis to figure the loss in interest hereinafter shown.

Date of Order of Taking	To What Date	Dates of Deposit	Amount	Date Withdrawn
Nov. 21, 1942 (I,2)	June 30, 1943	June 21, '43	$30,140	Feb. 1, 1944 (I, 53)
May 11, 1943	June 30, 1944	Apr. 6, '44	50,000	Apr. 13, 1944 (I, 59)
Aug. 12, 1944	June 30, 1945	Aug. 10, '44	50,000 (I, 68)	Aug. 18, 1944 (I, 72)
May 28, 1945	June 30, 1946	Aug. 8, '45	65,000	Aug. 11, 1945 (I, 89)
Judgment, $297,776.03 April 9, 1946		June 11, '46	98,124.27	Aug. 16, 1946 $75,000.00 (I, 39)
Pd. by purchase of govt. mach.		Mar. 23, '46	18,089.55	

28. The petitioner herein claimed interest at 6% on the $297,776.03 judgment as additional damage for the taking, beginning with the date of the taking to the time elected by the government to terminate the taking, June 30, 1946. The property was declared surplus and abandoned to the petitioner on March 23, 1946 (I, 97). Admittedly from the date the funds shown on the foregoing table were paid into the Registry of Court, the 6% would abate. There remains in the Registry of Court approximately $25,000, pending appeal (I, 139).

29. The court granted no interest whatever on $45,776.03 of the judgment. It should have granted interest at 6% thereon from the date of taking on November 21, 1942. Instead of granting interest on $252,000 at 6% from November 21, 1942 (less the payments made by deposit in the Registry of Court with interest thereon), the court after trial treated each year as a new taking without reference to the original time of taking, and by so doing the petitioner in the judgment rendered was de-

nied $21,314.72, at time of judgment, for interest compensation under the Statute (40 U. S. C. § 258a). This denial of interest was assigned as error, discussed, and argued under point XXII, page 66, appellant's brief, and Proposition of Law IV with the discussion thereof on pages 125-6 of appellant's brief referring to petitioner's motion in arrest of judgment (I, 97) and motion for new trial (I, 107). The trial court failed to correct this point relied upon and argued as above shown. Also the court refused to grant interest on $34,875.50 in supplies that were condemned and taken by the government on November 21, 1942, and not paid for until July 8, 1943. This interest up to the time of the judgment on April 9, 1946, amounted to $1,307.11. Both these items of interest were properly before the trial court[24] and the United States Circuit Court of Appeals. The federal statute cited clearly covers the situation of granting interest as contended by petitioner. Both items now aggregate in excess of $25,000. The cases to sustain Prop. of Law IV, Aplt's. br., pp. 125-6, seem to announce the only applicable law. The statute refers to interest for all purposes and makes no such permissive exception as erroneously made. (Aplt's. br., app. p. 6. 40-2 U. S. C. Sec. 258a. Infra, p. 40.)

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24. Assigned as Error Aplt's. br. p. 66, argued, on p. 126. Contained in Answer stricken, Vol. I, p. 30. Pet. in error, p. 51(2). Discussed by Court, Vol. II, p. 183; Motion in arrest of judgment denied, Vol. I, p. 98, III. Motion for new trial denied, Vol. I, p. 108(4). There was no disagreement regarding this item and when paid. The facts are not in dispute. The government claims because it voluntarily paid the item and the check was accepted, that concluded the matter. However, the supplies were taken along with all else. Payments may be received without prejudice to further rights under Sec. 258a U. S. C. 40-2.

QUESTIONS PRESENTED

I.

Did the trial court commit reversible or harmless error under 28 U. S. C. § 391, Jud. Code § 269, (1) by refusing to admit evidence, (2) by refusing to receive certain evidence offered, (3) by receiving certain evidence over objection, (4) by giving the court's instructions considered all together, (5) by refusing to give certain instructions requested by petitioner, and (6) by overruling the motion in arrest of judgment and overruling the motion for new trial?

II.

Is not the opinion of the United States Circuit Court of Appeals in error by stating that the judgment reflected all the elements of value which lawfully might be considered in determining the issue of just compensation to which the petitioner was entitled and that no errors of law were committed by the trial court that would warrant a reversal? The record shows thirty-two points relied upon for reversal, each of which was discussed with record page references given. (Aplt's. br., pp. 14-88; discussed and argued Prop. L. I, II, III, and IV, Aplt's. br., pp. 89-124.) These references sufficiently refute the opinion of the circuit court that most of the points relied upon for reversal "are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation." (Vol. IV, pp. 6-7.)

III.

In attempting to arrive at just compensation, was it not error for the trial court to deny the petitioner the right to prove the fair, reasonable market value of its plant as it was at the date of taking, when the evidence shows that the condemnor took and destroyed, as a direct result of the taking, with knowledge of the resulting damage, all the existing routes constituting the most valuable of the component parts of the composite property? (Aplt's. br., Error XIII, pp. 44-7; supra pp. 6-7, 11 with footnotes.).

IV.

Did not the trial court err in ruling out the evidence of the petitioner that it was completely and entirely driven from business by virtue of the taking and could not re-establish itself because of the obvious result of the taking, and the delayed "piecemeal" pay plan adopted by the government? (Table, supra p. 19; Error XIX, Aplt's. br., p. 61; Prop. L. II, p. 109; Vol. II, 437-9; supra p. 4.)

V.

Did not the trial court err in rejecting audits of the company, competently prepared, from which might be argued the facts that any dealer for the property for any purpose would desire to know? (Vol. H, Ex. 1-7, pp. 188-221; Error VII, Aplt's. br., pp. 28-33; argued Prop. L. I, pp. 95-8; supra, p. 5.)

VI.

Did not the trial court err in rejecting the evidence of the competent witness Judd, who offered to prove for

the consideration of the jury in assessing petitioner's damages the actual value of the trade routes in the course of business and as an inherent part of the business of a servicing company, and who offered to prove what it would cost the company based upon the experience of that company in the City of Omaha to re-establish those routes over the succeeding three years after the plant was abandoned to the petitioner. (Supra pp. 6-9; Vol. II, 367; Ex. 14, pp. 370-1, 372, 376, 380. Error XV, Aplt's. br., p. 51, and XVI, p. 53. Discussed, Aplt's. br., Prop. L. I, p. 89.)

VII.

Did not the court err, after the petitioner's case was closed, by permitting a government witness (Crowder), who failed to qualify properly as a competent authority on costs, to give his estimates of the probable cost to restore the property, including the building and machinery, which estimates consisted of 594 hearsay items; and over objection, the court remarking in the presence of the jury that such 594 documents were "government documents" and "official reports" and with such prestige were admitted? (Aplt's. br., Error XXVI, p. 70; argued Prop. L. II, p. 109; cross-exam., Vol. III, pp. 641; 648; 656-669. Supra, pp. 14; 16; 17; 19.)

VIII.

Did not the court err in receiving the evidence, over objection, of the government witnesses (Weber and Sholes), neither of whom was qualified to state that the fair, reasonable compensation for "temporary use" was a sum of money based upon interest on the value of the

building separately, the machinery and equipment separately, and the land separately, as appraised by the witnesses themselves, when the witnesses themselves could give no precedent in the laundry business for such a method for just compensation and when the court had before it a more fair and just method of arriving at just compensation by the difference in the values of the property before and after taking, or by fixing compensation based upon the fair, reasonable value of the property at the time of taking? (Weber, Vol. III, 721-757; Error XXVII, Aplt's br., pp. 72-5; argued Prop. L. II, p. 111. Sholes, Vol. III, 760-801; Error XXVIII, Aplt's. br., pp. 75-8; argued Prop. L. II, p. 111. Supra, pp. 6, 11, 18.)

IX.

Did not the trial court err in nullifying the evidence of the three officers and owners of the company when they offered their estimates of the fair, reasonable rental value of the physical assets, exclusive of good will, trade routes, and trade name, when such witnesses were the only qualified witnesses to give such testimony? And further, did not the trial court err in withholding its ruling on the government's objection to such testimony and then renounce it by instructions thus leaving no other testimony before the jury on such subject, as stated in the instructions of the court except the "expert witnesses" who gave as a proper measure of damage, interest on land, building, and machinery? (H. A. J., Vol. II, 421-443; Error XVIII, Aplt's. br., pp. 56-61. F. J., Vol. II, 454, 460; Error XX, Aplt's. br., pp. 63-4. A. L. J., Vol. II, 367; Error XIV, Aplt's. br., 48-51. The court's

instructions, Vol. I, 152-161. Error I, Aplt's. br., pp. 15-19. Argued, Prop. L. I, II, pp. 88, 109. Supra, pp. 13-14.)

X.

Were not the composite instructions of the trial court so at variance with both the facts and the applicable law as to substantially prejudice the rights of the petitioner by denying it just compensation, even under the measure of damage plan adopted by the court for the conduct of the case? (Court's inst., Vol. I, pp. 157-165; Error I, Aplt's. br., pp. 15-19; Prop. L. III, p. 124. Inst. requested by petitioner, refused, Vol. I, pp. 172-8. Supra pp. 12-14.)

XI.

Did not the court commit reversible error in refusing the rebuttal testimony of the petitioner's witnesses to rebut the government's witnesses on the cost to repair and replace the broken parts of the building, machinery, equipment, boilers, and power plant, especially under the indefinite plan for measuring damages finally adopted by the trial judge? (Aplt's. br., pp. 82, 83, 87; argued Prop. L. III, p. 124. Petitioner submitted as a Prop. L. that: "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605, 77 N. W. 120) although properly in the main case"; supra, pp. 18-19).

XII.

In an action in condemnation for just compensation, is it error for the court to instruct the jury that the case before them is not one for "damages" but is an "in-

quest"? (Error I-g, Aplt's. br., p. 16. Discussed Prop. L. I., p. 88; Vol. I, p. 155.)

XIII.

Did not the court commit reversible error when it instructed the jury to disregard evidence which was entirely absent from any testimony or evidence offered or received at the trial? The court instructed the jury to allow just compensation "without any sentimental values, without any good will, or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (Vol. I, 159; Error I-i, Aplt's br., p. 18; Prop. L. II, p. 109.)

XIV.

Did not the court err in failing to interpret 40 U. S. C. § 258a as amended (Aplt's. br., appendix, p. 6) as granting petitioner as a matter of statutory law 6% interest on the entire judgment of the jury from the date of the taking? Did not the court err by deciding without judicial precedent 6% interest only from the beginning of each fiscal year as if in fact there had been a separate taking of the same property at the beginning of each fiscal year? (Error XXII, Aplt's. br., p. 66; argued Aplt's. br., Prop. L. IV, p. 125. To the same effect, did not the court err in failing to grant interest on $34,875.50 of supplies condemned and taken on November 22, 1942, but not paid for until July 8, 1943? Points raised in answer, Vol. I, p. 30; stricken Vol. II, p. 183; raised in pet. in error, Vol. I, p. 52; raised again in motion in

arrest of judgment, Vol. I, p. 98, overruled; and in motion for new trial, Vol. I, p. 108, overruled; judgment entered denying interest as claimed, Vol. I, 103-7. Error XXII, Aplt's. br., p. 66; Prop. L. IV, p. 125; 40 U. S. C. § 258a. Supra, pp. 19-21.)

XV.

Did not the trial court commit reversible error when repeatedly throughout the trial and in its instructions to the jury it stated that the law announced by the Supreme Court of the United States in *U. S. v. General Motors Co.*, 323 U. S. 373, decided January 8, 1945, and in *U. S. v. Petty Motor Co.*, 327 U. S. 372, decided February 25, 1946, required the court to instruct that no damages could be considered (Vol. I, p. 155); just compensation must be limited to "rent" to the exclusion of other competent measures of damages of record (supra, pp. 6-8; 11; 18), figured as interest on the land, the building, and the machinery, separately valued (Vol. I, p. 159) with an additional sum, exclusive of general depreciation, for the estimated cost to repair or replace broken parts? (Trial court refused to set case for trial until General Motors case decided, Vol. I, pp. 74 and 60; motion for new trial, Vol. I, p. 124, pars. 25-6; Court's inst., Vol. I, 152; Vol. II, pp. 230-32. Court made ruling to limit petitioner's case to "rules laid down in the Utah case and in the Chicago case, the General Motors case." Vol. II, p. 232.)

XVI.

Did not the United States Circuit Court of Appeals commit error when it held that the decisions in U. S.

v. General Motors Co. and U. S. v. Petty Motor Co. were its authority for stating, "We cannot accept this proposition of law"? The said proposition of law is Prop. L. I set forth in appellant's brief, p. 89 and is copied from the opinion below, Vol. IV, p. 8, as follows:

> "When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the non-compensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

(Evidence on factual matters embraced in above statement of the law was rejected by the trial court. Cf. points relied upon for reversal, Appellant's brief: Error VI discussed, p. 27; VII, 28; VIII, pp. 37-8; XIII, pp. 44-8; XV, pp. 51-2; XVI, pp. 53-4; XVII, pp. 54-5; XIX, p. 61; XII, p. 43. Errors argued in the Propositions of Law, Aplt's. br., Prop. Law, pp. 89-109.) (Court's Inst., Vol. I, p. 154, stated: "Under the Constitution and under

the law you cannot make any allowance whatever for property that is not taken." Supra, pp. 6-11.)

XVII.

Did not the court err by failing to properly interpret and apply the condemnation statutes (supra, p. 3; appendix Aplt's. br., pp. 1-16) relied upon by the government in its petition (Vol. I, par. 1) filed November 21, 1942, and the same statutes pleaded in defense by the condemnee in answer (stricken, Vol. II, p. 183) and in its requested instructions (refused, Vol. I, p. 172), principally in the following particulars:

1. These statutes should properly be interpreted in pari materia.

2. When so interpreted, Section 171, 50 U. S. C., as amended, does not clearly cover the case at bar, because the condemnee possessed land but did not possess "the temporary use thereof or other interest therein." Instead, the government created a "temporary use" of its own by its petition and by so doing took over an operating company "pro tem."

3. The result of the taking rather than the form of the petition determines the extent of condemnation for the purpose of paying just compensation, and this power of determination is lodged exclusively in the judicial branch of the government.

4. Congress has protected previous owners and the government as well by enacting Section 722, as an amendment to the Act of October 16, 1941, 50 U. S. C., entitled, "Return of Property to Original Owner." So that value

before and value after has been recognized in this effective manner. Prop. L. II, Aplt's. br., pp. 112-123, brought this point to the Circuit Court's attention.

5. This difference in the value at time of taking and at time of return, while recognized by Congress and as proper by the courts, was erroneously denied the laundry company in this case (cf. petitioner's instr. refused, Vol. I, Inst. No. II, p. 172; No. X, p. 175; No. XIII, p. 177; No. XIV, p. 177. Answer, Vol. I, pleading the statutes, Vol. I, p. 21, at pars. XV, XVI, XVIII, pp. 28-9. Order striking same, Vol. II, p. 183; Vol. II, p. 863. Motion for new trial, Vol. I, p. 107, overruled. Special exhibits were attached to the motion as these statutes, Vol. I, pp. 126-134. Error in striking them from consideration set forth and discussed, Aplt's. br., p. 26; Prop. L. argued I and II, Aplt's. br., pp. 89, 109. All condemnation statutes in question are copied in full in appendix to Aplt's. br.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Herein the Circuit Court has decided an important question of federal law which has not been but should be settled by this Court.

1. The issue presents an important phase of the law of eminent domain not passed upon under the present amendments to the condemnation statutes; and the opinion is at variance with previous decisions of this Court under the previous statutes. Under these new stat-

utes (supra p. 3 and Appendix Aplt's. br.) in force when the case at bar was filed protection of condemnees against lessening of just compensation was made more certain.

2. There were three phases of the law in which the public had an interest because every citizen's property, including operating businesses, might be taken for military purposes. The statutes prohibiting taking by condemnation, "of any machinery or equipment which is in actual use in connection with an operating factory or business and which is necessary to the operation of such factory or business," was enacted October 16, 1941, by the First War Powers Act (50 U. S. C. § 721, C. 445, 55 Stat. 742) and was repealed by the Second War Powers Act, 1942 (50 U. S. C. § 636, amending said previous law, § 721). This later statute left in force Section 2 of the Act of October 16, 1941, providing for the return to the owner of the property condemned if the owner would pay the government for its then value, and by Section 722 of 50 U. S. C., the time for offering to return to the owners if paid for at its then value was extended to December 31, 1946. The property in question herein was taken November 21, 1942, and abandoned to the owner as surplus property on March 23, 1946 (Vol. I, 97), in its then condition. These statutes should be interpreted in pari materia and announced as the law applicable to the facts in the case at bar.

3. On January 8, 1945, this Court granted certiorari and decided one of the three phases of eminent domain in *U. S. v. General Motors Co.*, 323 U. S. 373, and granted certiorari because a question of first impression was in-

volved in the interpretation of the measure of damages for taking a part of the term of condemnee's lease or temporary use. The property was a warehouse. The taking left the condemnee-tenant the privilege of returning and using the warehouse for the unexpired term of the lease. Damages were awarded for the destruction and loss resulting from the moving out and ostensibly back again.

4. On February 25, 1946, this Court granted certiorari and decided the second phase of the questions involved in condemnation in *U. S. v. Petty Motor Co.*, 327 U. S. 372, wherein the entire lease or temporary use of the condemnee-tenant was taken, and the resulting damages were held nonexistent and denied.

5. Now herein arises the third phase of the law of eminent domain and for which certiorari should be granted. Herein the condemnee was neither a lessor nor a lessee, nor the occupier by temporary use of the property involved, but was the absolute fee owner and operator of a going laundry and dry cleaning business consisting of real and personal property (Supra, pp. 3-6).

6. The government ~~for the first time~~ mentioned in any reported case, took, according to its petition of taking, only a "temporary use" of building and machinery, but for all practical common-sense purposes actually took a going business institution which it needed for its Army and substituted its own pay customers for the route customers of condemnee. Certiorari should therefore be granted likewise herein in order to present the third phase to determine the proper measure of damages upon

the abandonment of the property to the petitioner after 3.6 years of government operation (Supra, pp. 6-9, Vol. II, p. 448).

7. The only element of any appreciable value to make the bricks, mortar, and machinery of value in this particular business, was its trade routes, which were destroyed. They were the most valuable of any part of the property. Condemnee was a servicing company. It could not carry on business elsewhere. It could not move, as it was left nothing to move. It could not serve. Its routes were destroyed. Such destruction was not consequential damages, or loss of future business, or frustration of a plan for development, nor was it a loss for good will. In the case at bar, those elements were specifically eliminated from all evidence of value offered as proof as the record shows (Supra, pp. 13-14; 8[15]).

8. If certiorari is granted, petitioner will so demonstrate to this Court.

II.

The decision of the Circuit Court of Appeals in this case decides a federal question in a way probably in conflict with the applicable decisions of this Court on the question of the condemnation of property of a going concern.

1. The Circuit Court opinion below recites:

> "Where the right to temporarily use and occupy property is the interest taken, just compensation is the value on the market of the use and occupancy (*United States v. Petty Motor Co.*, supra), but evidence of loss of profits, damage to good will, and other such consequential losses must be excluded in determining market value. Id., pages 377-378."

2. The *General Motors Co.* case is cited in the opinion as authority. The opinion below rules out the trade's accepted value of the routes as an existing asset, by classifying them within the foregoing statement (Vol. IV, p. 8).

3. The opinion also attempts to justify ruling out the evidence of experts on the value of the routes separated from the plant as well as an element of the composite value of the laundry and dry cleaning establishment as a going concern. The Circuit Court also approves the denial of the trial court of evidence of the cost to reestablish these routes. Furthermore, the opinion upholds the trial court's denial of the right to prove the difference in the value of the property at the date taken and the date declared surplus and abandoned to the petitioner. Such holdings are in conflict with other applicable decisions of this Court.

4. For example, *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622, was reversed because the evidence of the value "did not take into account the franchise of the company to collect tolls." The court said:

> "The result of the trial was a finding by the court that the value of the lock and dam No. 7 was $209,000, 'not considering or estimating in this decree the franchise of this company to collect tolls.'"

The case was reversed because, as stated:

> "So before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property,—the franchise to take tolls."

5. Furthermore, the court stated that it was not bound by the statements in the declaration of taking (petition in condemnation) as to what was taken:

> "We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.
>
> "That just compensation requires payment for the franchise to take tolls as well as for the value of the tangible property."

6. Furthermore,

> " * * * And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in Boyd v. U. S., 116 U. S. 616, 635, 6 Sup. Ct. Rep. 524: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.' "

7. In *U. S. v. Powelson* (1943), 319 U. S. 266, 63 S. Ct. 1047, certiorari was granted and the cause reversed because the damages to the power sites therein involved were evaluated in the condemnation proceedings though undeveloped. They had value, no doubt, but, the opinion stated, "a promotional scheme wholly in futuro is not private property." The majority opinion states:

"* * * If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed as Sears v. City of Akron, supra, indicates. Then the United States would be acquiring a business, not simply frustrating a promotional scheme. * * *

"We hold only that profits attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken."

8. The *Powelson* case cited in the opinion in the case at bar to sustain the trial court, as a matter of law sustains the contention of the petitioner. If the *Powelson* case is authority for the justification of the opinion below, then there is most certainly a conflict in the decisions of this Court on the subject of what shall be taken into consideration when a going business is destroyed by the taking.

9. The cases which hold that loss of business and good will are not compensable are usually found in that class of cases where the land or building was taken by the government, and the condemnee had the opportunity with both the money paid and the facilities not taken, to carry on the business elsewhere, such as in *Bothwell v. U. S.*, 254 U. S. 231 (cattle ranch condemned; cited to sustain opinion below, Vol. IV, 8).

10. Also, the decision in *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668, involves a rule founded upon a statute that, "Injury to a business carried on upon lands taken for public use, it is generally held, does not

constitute an element of just compensation," but the case likewise states, "This statute therefore does not deny a right; it grants one and limits it to a business already established." The court stated, "One who came after the enactment and established a business did so with notice that the extra constitutional compensation provided for would not apply to him." The classification was held constitutional (cited to sustain opinion below, Vol. IV, p. 8, but obviously does not).

11. *Mitchell v. U. S.*, 267 U. S. 341, arose over a special statute providing for the condemnation of land for military purposes in Maryland near Washington. The award was made for the damage to lands upon which a special grade of corn was raised, then later in the Court of Claims the condemnee was denied the right to damages to the corn canning manufacturing business. The claim was based upon the fact that because the sweet corn fields were taken, therefore the manufacturing plant should be compensated for the loss because no more corn could be obtained from the condemned fields. However, the court stated, "Moreover, the act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act."

12. These last three cases cited in the opinion below (Vol. IV, p. 8) in the case at bar fail to substantiate the decision. Nor do these cases support the opinion on the factual situation that the damages done to the trade routes fall into the category of consequential or other noncompensable damages.

III.

The decision of the Circuit Court below is in conflict with decisions of other Circuit Courts on the same matter.

1. In *National Brick Co. v. U. S.* (C. C. A., Dist. Columbia, 1942), heard before Groner, C. J., Miller, and Vinson, 131 F. 2d 30, both the conduct of the trial and the conclusions were reviewed. There the brick company owned and was using and selling from time to time valuable deposits of sand lying under the surface of the lands which the government needed. The Circuit Court held that evaluating the land with the sand in place should not be interpreted that the condemnee was seeking to prove the profits to be derived from the sale of sand. In the case at bar the court bases its opinion on the fact that the trade routes were evaluated as future profits or good will and therefore held the destruction to be noncompensable.

2. Thus, it would seem that these two opinions are directly in conflict.

3. The opinion is also in conflict with a number of United States District Court decisions that have never been appealed because settlements were made in those cases. For example, in *U. S. v. Land in Oakland* (Cal.), 53 F. Supp. 767 and in *U. S. v. Bauman* (Ore.), 56 F. Supp. 109, the courts held that a temporary use with the term extended from year to year amounted to a taking of the fee for all intents and purposes. In such case the before and after value was held to be a just way to estimate the compensation for the so-called temporary use of such property. The trial court herein refused to

follow those cases, and the Circuit Court approved the trial court's rulings.

4. Also, the decision of the Circuit Court herein is in conflict with *1100 Acres in Smith County, Texas* (C. C. A. 5, 1945), 152 F. 2d 566. There the development of oil lands was stopped by the use of the surface by the Army. The resulting damages in reference to the inability to carry on operations in the oil beneath the lands, was the subject matter of proper compensable damages when proven. The reasons given in the Texas case are diametrically opposed to the reasons given by the Circuit Court in the case at bar in upholding the trial court in denying similar compensable damages.

IV.

The opinion of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

1. There are under this heading two main reasons for the allowance of the writ of certiorari. The first is in reference to the error in figuring interest. The result is diametrically opposite to the clear unambiguous wording of the interest statute, Sec. 258a, 40 U. S. C. Under that section a large number of cases have been decided which were submitted and argued to the Circuit Court (Aplt's. br., Error XXII, p. 66. Prop. L. IV, p. 125; Supra, pp. 19-21). Interest is a matter of additional just compensation (about $25,000) payable to petitioner because deprived of its property completely and entirely on and after November 22, 1942. It would seem that the fiction of repeated ex parte continuances of the possession under

the power of eminent domain should not be permitted by the Court to defeat the application of the statute. The decision of the Circuit Court below is supported by no cases which have ever been reported anywhere to justify the opinion in that regard. Accordingly, the opinion is in direct conflict with *U. S. v. Rogers* (1921), 255 U. S. 163, 41 S. Ct. 281; *Seaboard Air Line Ry. Co. v. U. S.* (1923), 261 U. S. 299, 43 S. Ct. 354; *Phelps v. U. S.* (1927), 274 U. S. 341, 47 S. Ct. 611; *Liggett & Myers Tobacco Co. v. U. S.* (1927), 274 U. S. 215, 47 S. Ct. 581; *U. S. v. Northern Pac. Ry. Co.* (Wash. 1943), 51 F. Supp. 749; *U. S. v. Land in Saunders County* (Neb., 1944), 57 F. Supp. 745; *U. S. v. Land in New York* (1945), 147 F. 2d 351; *U. S. v. Land in St. Louis* (1941), 41 F. Supp. 809.

2. The second reason under this heading for the allowance of the writ of certiorari is based upon the Circuit Court's sanction of the trial court's conduct of the case. It may be seen by reading all the instructions of the court (Vol. I, p. 150; and the volunteered remarks of the court referred to supra pp. 3-21) that the court began the trial and concluded it by announcing certain rules in eminent domain proceedings, which destroyed all the testimony and evidence before the jury from a common sense viewpoint that was introduced by the witnesses for the petitioner. In effect the trial court instructed the jury to find "rent" based upon a formula concocted as interest on the value of the separate items found by the government's witnesses, and nothing else of substance was left for the consideration of the jurymen, but to find as they did (Supra, pp. 18; 11; 6-9; Vol. I, pp. 152-165).

3. Similar conduct of a trial court aided in causing the reversal of the case of *National Brick Co. v. U. S.*

(C. C. A., Dist. Columbia, 1942), 131 F. 2d 30; and in the Nebraska case of *Langdon v. Loup River* (1944), 144 Neb. 325, 13 N. W. 2d 168, wherein the court said:

> "Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation."

4. In the National Brick Co. case the court said:

> "* * * We think sufficient harm has been done by the rejection of proper evidence of value, coupled with the judge's statement limiting the appraisal to the value as real estate, to leave the jury bewildered as to the proper elements to be taken into consideration in ascertaining the fair market value of the property." (Supra, pp. 9;[17] 13;[23] 14;[23] Vol. I, pp. 155-162; Vol. II, pp. 348-9; Vol. III, pp. 632; 648. Motion New Trial, Vol. I, part II, pp. 115-134.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated May 24, 1948.

Respectfully submitted,

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SUPREME COURT

In the
Supreme Court of the United States

OCTOBER TERM, 1948

NO. 63.

KIMBALL LAUNDRY COMPANY, A Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF OF PETITIONER

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In the
Supreme Court of the United States

OCTOBER TERM, 1948

NO. 63

KIMBALL LAUNDRY COMPANY, A Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF OF PETITIONER

To: The Honorable The Supreme Court of The United States:

The petitioner, Kimball Laundry Company, a corporation, of Omaha, Nebraska, was granted a hearing by this Court upon petition for certiorari, October 11, 1948. The writ was directed to the United States Court of Ap-

peals, Eighth Circuit. The decision of that court to be reviewed was rendered March 11, 1948, affirming a judgment of the United States District Court for the District of Nebraska given in a condemnation proceedings wherein the petitioner's laundry and dry cleaning plant consisting of real and personal property was totally taken for an Army military laundry, on November 21, 1942. The case was tried to a jury on March 4-20, 1946. On March 22, 1946, two days after the case was closed, the Army declared the property surplus and abandoned it to the petitioner. The government prevailed in limiting its liability to the 3.6 years of operation, measured by interest on its separately appraised value of land, building, and machinery, plus its estimate of what would be the costs to replace and restore broken parts of the building and machinery. The petitioner as owner and operator was denied all of the measures for compensable damage which it offered to prove, as hereinafter set forth and explained under the heading, "Statement of the Case and Proceedings Below."

Petitioner seeks reversal and trial in accordance with this Court's mandate based upon the applicable law presented in this review.

THE OPINION AND JUDGMENT IN THE COURTS BELOW

1. The opinion dated March 11, 1948, sought to be reversed is Kimball Laundry Company, a Corporation, appellant, versus United States of America, appellee, Civil No. 13494, found in Vol. IV of the certified record 166 F. 2d 856, May 10, 1948, Court of Appeals, Eighth Circuit.

2. The verdict of the jury and the judgment of the trial Court below are found in Vol. I, 95 and 101 to 107.

JURISDICTION

This Court has jurisdiction to review the decision questioned, under Section 240(a), Judicial Code (28 U. S. C. 347a).

The questions presented arose in condemnation proceedings instituted by the United States against the petitioner, wherein the federal courts have jurisdiction (40 U. S. C. 257).

THE STATUTES INVOLVED

The following statutes involved are copied in the appendix to this brief.

28 U. S. C. § 391 (Judicial Code, § 269).

50 U. S. C. § 171; 171a; 621; 632; 636, amending 721; 636a, further amendments; 721; 722 (providing methods to pay government upon return of property to owner; 775; 776).

40 U. S. C. § 257, 258, 258a. Fed. Rules 81a(7).

Fifth Amendment to Federal Constitution on "just compensation."

Constitution of Nebraska, Art. I, § 21 (Vol. II, Rev. Stat. Neb. 1943, on "just compensation." (Aplt's. br. below, App. 13).

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

Note: [The footnotes on the following pages direct attention to the points relied upon for reversal in the Court of Appeals. These points were discussed and argued as error in petitioner's brief in the Court of Appeals. By stipulation of counsel when the record on that appeal was prepared, the points were placed in the appellant's brief rather than in the record (Vol. I, 142). Thus the brief below becomes a part of the record for review herein to that extent to determine the fact that these points were presented, discussed and briefed below. These same points with same numbers are set forth herein. Infra, pp. 34-108.

These points relied upon for reversal were discussed and argued in petitioner's brief (Aplt's. br. below, 14-88), followed by the supporting propositions of law (Aplt's. br. below, 89-126). Thus the necessity of reference herein to appellant's brief below because the court below said in reference to the presentation of the points, "most of them are not argued in the brief," and that "errors assigned, but not argued in the brief are waived." (Vol. IV, 6). Infra, pp. 34-108.

The court below made no statement of which points it deemed were or were not argued. Petitioner contends all were sufficiently argued to fully apprise the court of the errors. The points relied upon are set forth herein infra, pp. 34-108, and may be referred to herein the same as found in "Aplt's. br. below."]

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1. The petitioner, Kimball Laundry Company, is a Nebraska corporation. It owned the fee title, free from

liens, to all its real estate. Its personal property was free from liens or claims. It was using all its facilities, as a going concern, to operate an exceptionally large laundry and dry cleaning establishment in Omaha, Nebraska. It was neither the lessee nor lessor of any of the property involved. It had the "temporary use" of none of its real or personal property for any purpose.[1] It was doing a gross annual business of $400,000. It served a large part of the population of 250,000 of the city. This was the condition on Saturday, November 21, 1942, the day on which the petition in condemnation was filed in the United States Court.[2] The Army Quartermaster Corps took complete possession the following day of all appellant's plant with all its facilities, machinery, and equipment. The petitioner was, by force of the taking, put out of business.[3] The Army continued without interruption the operation of this plant as a laundry and dry cleaning establishment, retaining 180 employees and the managerial staff. Soon prisoners of war (100) replaced the skilled employees.[4] The Army operated the plant to service, for pay, the laundry and dry cleaning requirements of the soldiers, officers, and all the Army hospitals, training centers, and forts in the Seventh Service Command, all from this property taken by condemnation.[4.1]

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1. Complete word picture of plant, Vol. II, 273-285. Previous 5 years audits to show value, Vol. II, 290 (also to 221) rejected by the court.
2. Pet., Vol. I, 1 to 5. Condemns "right to use and occupy" p. 2. Also right to use and occupy—"all personal property—used in connection with said laundry." Order of taking recited—"prior to taking over business of said property." Vol. I, 11; and taken for—"the establishment of a military laundry located in the city of Omaha—," Vol. I, 17.
3. The trial court rejected the evidence of the president of the company that it was completely driven out of business as immaterial: Vol. II, 437-9. Error discussed Aplt's. br. below, XIX, 61. Infra herein 34-108.
4. Vol. II, 266, 270. Prisoners of war (100) by replacing skilled employees added to the destruction of the machinery and equipment.
4.1 Vol. II, 447-8. Court refused to permit arguing soldiers personally paid the army for their laundry services. Vol. II, 448.

2. The Army was admittedly in the continuous, uninterrupted possession and operation of the property to the exclusion of the petitioner from the time of the taking to the day it was declared surplus and abandoned to the petitioner, in its unrestored condition two days after the jury's verdict on March 20, 1946, at which time the property was by the army "found and declared to be surplus as of March 23, 1946."[4] It was abandoned to the petitioner without repairs, replacements or any attempt by the army to redeliver what had been condemned. Just compensation measured in money is now involved.

3. When taken, the company was doing an annual gross business as above stated of approximately $400,000.00. Financial statements showed a continual growth in volume and income since 1933.[5] It was one of the most efficient and expensively equipped laundries west of Chicago.[6] Its building was built of steel and concrete, five stories, 132 feet square. Its business was obviously that of a servicing corporation for those it agreed to service. It sold no merchandise; it manufactured none. Its value for condemnation or sale purpose depended upon the extent of the services performed and the profits on that work by this company. Its gross income since 1924 was

4. Vol. I, 97.

5. All the certified public accountants' evidence and exhibits were rejected save one column showing volume that was of no value without the complete audit. In a servicing company such as this petitioner, the business results are necessary to arrive at value besides the "brick and mortar." Vol. II, Ex. 1, 190; Ex. 2, 199; Ex. 3, 200; Ex. 4, 204; Ex. 5, 206; Ex. 6, 214-18; Ex. 7, 221.

Error in rejections, Aplt's. br. below, VII, 28-33, where each exhibit is discussed fully, with trial court's ruling by page reference to record, where not accepted. In the Propositions of Law these exhibits and testimony are further discussed, Aplt's. br. below, 95, 119; as to $400,000 business, Vol. II, 199-200.

6. Vol. II, 396-401.

$6,728,454.64.[7] The audits showed what part of this income was expended ($273,654.83 over last 6 years) to build and develop as assets what is known to the trade as trade routes.[7] The cost of the machinery and equipment at the time of the taking in 1942 was $405,294.81.[7] Its appraised value at that time was $273,831.39,[8] and the same men in 1945 shortly before abandoned, appraised it at $120,699.75. The cost of the building at the time of the taking was $205,035.12. The reproduction value of the building on November 21, 1942, was $280,348.00.[9] The power equipment was valued when taken at $62,928.08.[10] The land upon which the building and equipment stood was valued at $30,000.00. Its location was in downtown Omaha. The following is an itemization of the values comprising the plant without good will or capitalization of future earnings or prospective profit on November 21, 1942:

Building	$280,348.00
Machinery and equipment	273,831.39
Power equipment and incidental installations	62,928.08
Land	30,000.00
Customers' routes	340,516.85
Total	$987,624.32

(Rejected as immaterial by trial Court.)[11]

7. C. P. A. Hilmer's testimony on Exhibits, Vol. II, 190-221, rejected. (cf. footnote 5 above.) Vol. II, 244.

8. Vol. II, 245-262, Ex. 21-3, 260. Shows value of machinery and equipment in 1942, and by same witnesses in 1945 before the trial. Difference in value—$153,831.54. This evidence was taken from jury by Court's instructions. Error discussed Aplt's. br., below, 30, IX, argued under Propositions of Law, 113. It will be seen by the references that such measure of damages was denied consideration by the jury. Vol. I, 152-165.

9. Vol. II, Ex. 19, 264.

10. Vol. II, Ex. 23, 272-3. This before and after valuation of power equipment was denied consideration by the jury in the trial court's Instructions Argued Aplt's. br. below, 15-21. Instructions requested but not given, 21-26. Interest on "brick and mortar" values alone were permitted for the jury's consideration. Argued under Prop. Law I and II, Aplt's. br. below, 89 and 109.

4. To permanently establish itself by the expense of building up trade routes, men had been employed to interview various families and commercial houses throughout the City of Omaha for the solicitation of their laundry and dry cleaning requirements. These men during the previous six years built up for petitioner 15,093 regular trade route customers, all of which were being serviced on November 21, 1942. Under the price and accommodation terms of the contracts made by the petitioner, the articles for laundry and dry cleaning service were picked up without further contract and when serviced were returned without further contracts between such persons and the company. To further illustrate actual values in the condemned property, there were 1500 desk customers who were thus personally serviced across the counter. There were 4648 special customers who required special services at times throughout the year. There were 20,802 customers who from time to time sent in table linen, spreads, rugs, comforts, blankets, and lace curtains. These persons aggregated 42,043, called by the trade "trade route customers." There were no duplications in the figure. The petitioner paid to these route men to build and keep these routes during the said 6 years previous to the taking, $237,654.83, in salaries and commissions.[12] This sum was the principal but not the only item of expense to keep and maintain the routes against the competition from other laundries who likewise had route men at work

11. Aplt's. br. below, XIII, 44-48, Vol. II, 273-9; trial court's ruling, Vol. II, 315. All rejected by Court except land, building and machinery as basis for interest on each value as the only measure of damages permitted by Instructions, Vol. I, 150-165; Exceptions 165, 167; Appellant's Instructions requested but refused, 172-178. Assigned and discussed, Aplt's. br. below, 15-26. Argued, Prop. Law I and II, 89, 109.

12. Vol. II, 244; 234 shows itemization of gross income past five years. $400,000 for 1942. McDougal, Vol. II, 244, Ex. 13 refused. Error VIII, 33-38, Aplt's. br. below, argued, Prop. Law II, 109.

on guaranteed salaries and commissions. These routes (similar to a newspaper's circulation) had a market value in the trade as an inherent part of the concern, of $340,516.85 when the plant was taken. These were valued by trade practices as follows: $20 for each of 15,093 trade route customers; 50c for each of 4648 pillow customers; 50c for each of 6810 table linen customers; 50c for each of 5814 rug and blanket customers; 50c for each of 8178 lace curtain customers; $10 for each of 1500 call customers; and for 44 commercial customers which produced $34,253.13 revenue for 47 weeks during 1942, such as hotels, railroads, clubs, etc., evaluated in the trade at $728.79 per week at 15 times the weekly amount, thus proving the sum total of $340,516.85 as the value of the trade routes at the time of the taking.[13] These routes were totally destroyed by the taking and the retention of the property by the Army for three years, seven months, and eight days.[14] The army rejected all customers except soldiers and officers and the army hospitals, forts, etc., in the Seventh Corp Area. The part of the population serviced by the petitioner went immediately to other competing laundries as the obvious result of the taking. No money was paid at the taking and no opportunity whatever afforded appellant to continue elsewhere. Obviously this was the result of the necessity for immediate taking—to be later compensated in money.

5. The Certified Public Accountant's reports proved that no sums were carried for good will, trade name, advertising, or anticipated profits, future business or esti-

13. The witness Judd qualified as an expert to give these trade route values as a matter of trade practice. The trial court denied all consideration of them either as separate items or as a part of the composite value in 1942, or for any other purpose whatsoever. Vol. II, 367; Ex. 14, Vol. II, 370-1.

14. Vol. II, 437-9. Error predicated on rejection argued 89 Aplt's. br. below, 61, XIX; Vol. II, 237, explanation of Ex. 11.

mates of the value of the business. Only the realty and personalty valued as tangible assets were shown of record. Obviously these audits contained no evaluation of the trade routes[15] as good will. (Table, supra, page 7.)

6. By expert testimony based upon the actual experiences and fully itemized in exhibit form, the cost to build up again in the City of Omaha these trade routes; was offered in evidence. During the first year the gross income would be $100,000, while the total expense for that period would be $251,680.00, which, after figuring income, would show a net operating loss at the end of the first year of $151,680.00. For the second year the gross income would be $150,000.00 with an expense of $280,366.80, or an operating loss the second year of $130,366.80. For the third year there would be a gross income of $200,000.00 with an expense item of $330,483.20, and an operating loss of $130,483.20. In the fourth year the company should be able, then, to operate without further losses and build up its previous profitable income. But for the three years the net cost to re-establish its laundry and dry cleaning routes with the plant and facilities to be maintained and operated while so doing would be $411,450.00,[16] or a net loss of that sum of money.

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15. Vol. II, 200 C. P. A. Hillmer stating, "These items which were a factor in getting the increased business have been charged to expense and have not been capitalized as good will."

16. Vol. II, 372, 376, 380. All this evidence was rejected, with the trade route values, as not within the issues. Nevertheless in the opinion of the Court of Appeals the statement is made wholly without foundation and contrary to the above offered proof at Vol. IV, 8. "No doubt the government's occupation of the plant disrupted and damaged the company's business, although it could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business." This important part of the opinion erroneously infers that the evidence of cost to rebuild the routes, and the time it would take, and their value, when destroyed by the taking, were absent from the recorded testimony. The evidence was offered and rejected. Vol. II, 367, 370, 437-9. If the topic was important enough for the Court of Appeals to rule upon, it should have done so based upon the competent evidence offered in the record as above indexed. Aplt's. br. below, 53, Error XVI and discussion.

7. The building previously valued at $280,348.00 and the land at $30,000.00 were declared surplus after 3.6 years and abandoned to the petitioner. The power equipment and incidental installations were rendered useless or destroyed to such an extent that by orders of the Army commanding officers the plant was declared a danger to human life because of the unsafe condition of the boilers except for limited use at the time of surrender.[17] This near useless condition was occasioned by the necessary overloading and long hours of hard use. The power equipment was valued at $62,928.08 at the time of the taking and $35,260.53 at the time of trial, or a loss of $27,667.55 on such items.[18]

8. The building had considerable structural damage resulting from the overloading of boilers, causing shaking, and also from the rough usage in the rush to turn out the vast amount of work necessarily required by the army in the prosecution of the war. The very best of expert testimony of petitioner's witnesses gave detailed estimates of cost of the repairs to the building to place it in the condition that it was at the time of the taking at $53,970.00,[19] thus reducing the value of the building from $280,348.00 to $226,378.00, exclusive of painting or repairs to plumbing, heating, boilers, power plant, etc. The painting necessary after the 3.6 years was estimated at $17,281.00[20] by the best of expert painting contractors, thus reducing

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17. Vol. II, 310-11; Ex. 22-A, warning by command Major General Craig. Vol. II, 297-8. This offer to prove the laundry could not be operated at all in its condition invoked this trial Court's remark, "I can go down and operate one by myself, and I don't know anything about a laundry." This remark was obviously highly prejudicial and contrary to all the evidence. Error discussed Aplt's. br. below, XII, 13. Prop. of Law III.

18. Vol. II, 253.

19. Peter Kiewit, Vol. III, 831; Ex. 53, 835. Rejected.

20. Vol. III, 823; Ex. 52, 829 (Steinheimer). Rejected.

again the valuation of the building by such amount at the time of its abandonment. This evidence was rejected as indexed in footnotes.

9. Thus it might have been argued to the jury from this evidence, had it been received, that the building was valued, when returned, at $280,348.00 less $53,970.00 and $17,281.00, or reduced to $209,097.00; the machinery and equipment at $120,699.75;[20.1] the power equipment and incidental installations, $35,260.53; the land remaining at the same value of $30,000.00; and the trade routes were totally destroyed by the taking. These items aggregate $395,057.28. The difference in the valuation of the property of $987,624.32 when taken, and $395,057.28 in value when returned, has resulted in a loss of $592,567.04, to petitioner on the basis of the before and after values. The following tables illustrate the difference:

Date of taking Nov. 21, 1942.		Mar. 23, 1946 Date of return.
Land	$ 30,000.00	$ 30,000.00
Building	280,348.00	209,097.00
Power equipment	62,928.08	35,260.53
Mach., equip.	273,831.39	120,699.75
Route values	340,516.85	none
	987,624.32	395,057.28
Petitioner's Loss on before and after value		$592,567.04
Verdict under the court's instructions		297,776.03
Additional compensation denied completely by the court[20.2]		$294,791.01

20.1 Vol. II, 245, 262; Ex. 21-3, 260. Rejected by Instructions, Vol. I, 157-162. Assigned as error and discussed Aplt's. br. below, 82, 83, 87; also 39; Prop. of Law, I and II, 89, 109.

20.2 Vol. I, 155-162. Requested Instructions Refused, Vol. I, 172; Exceptions, Vol. I, 165.

10. The capital stock was owned by Harry A. Jacobberger, his brother, A. L. Jacobberger, and a son of Harry, Frederick, and their families. Each had spent his life in the laundry business. Frederick became a major in the United States Army in charge of the government laundry at Camp Carson, Colorado, and qualified as an expert with unusual experience. A. L. Jaccoberger, its general manager for years, offered to prove that the laundry had a fair, reasonable, market value as a going concern on November 21, 1942, of $987.624.32. This was rejected.[20.3] For the purpose of verification and explanation of the composite value, exclusive of any value for good will or trade name, he offered to prove and corroborate the evidence of the other witnesses shown in the table supra, page 6.

11. The jury's verdict[21] for the "use value" was $252,000.00, which is exclusive of the $45,776.03 returned under the instructions of the court[21.1] on the estimate of the damage to physical property suffered by the petitioner making the general judgment of $297,776.03.

12. Assuming that all other losses were included in the difference in the values of the property in 1942 and 1946 as $592,567.04, it is apparent from the evidence that should have been submitted to the jury, under proper instructions, that the verdict might readily have resulted in the sum of $592,567.04 rather than the verdict of $297,776.03 which was based on the evidence as limited by the trial court, the denial of requested instructions, and the exceptions to the ruling.[21.1]

20.3 Vol. II, 312-316.
21 Vol. I, 95; 101.
21.1 Vol. I, 155-162; 172; 165.

13. The court, by ruling out all the evidence as to the value of the plant as a going concern on November 21, 1942, either for the purpose of showing the basis for determining use or for the purpose of showing before and after value to determine proper pay for use,[22] denied petitioner substantial rights.

14. If the government's witnesses were permitted to testify that the proper measure of damages was the isolated value of the building, the isolated value of the machinery and the land, and to figure a percentage of interest thereon as the government's theory, and accepted by the court, then most certainly the court should have permitted the petitioner's offsetting evidence of what it considered the fair, reasonable "rental" value of the property when offered by the petitioner. This was denied directly or nullified by the court's instructions. The court for all intents and purposes instructed the jury to disregard everything that the owners had stated as to values for temporary use and left for the jury only the testimony of the government's inexperienced witnesses.[22.1]

15. At the very outset of the trial the court struck the answer of the petitioner.[22.2] The court refused the applications previously made for a pretrial hearing and failed to enter any order or direction as to the method or manner of proof for the measure of damages,[22.3] but the court stated, "in a sense we are plowing new ground, trying to arrive at a reasonable basis to afford the * * * owners just compensation under the Constitution."[22.4] Con-

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22. Vol. II, 315-6; Error Aplt's. br. below, XIII, 44-6. Argued under Prop. Law I, Aplt's. br. below, 89, 92, 103, 108-9; Vol. I, 155.
22.1 Vol. I, 157-162.
22.2 Vol. II, 183; Vol. III, 863.
22.3 Infra pp. 45-6.
22.4 Vol. II, 262-3.

sequently, the petitioner, opening the trial, took the position that the fair, reasonable market value of the property at the time of taking would be proper for all purposes during the trial. This position the court denied, and either refused to hear or ruled out on instructions to the jury evidence of the fair, reasonable market value when taken, for all purposes, as hereinabove clearly set forth and indexed in the footnotes, supra, p. 7.

16. However, the petitioner sought to show the fair, reasonable compensation for the use of the premises during the period because the court repeatedly so ruled must be the sole measure of damages. These "use" sums given by Harry A. Jacobberger, A. L. Jacobberger, and Fred Jacobberger were $600,000, $570,000, and $570,000 respectively.[23-1-2-3-4-5] Those figures included all items of com-

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23. A. L. J., Vol. II, 318-367; After 50 pages of examination to substantiate $570,000 as just compensation for the use, including all damages except to trade routes and business, the court said it would withhold ruling. Vol. II, 331—"We will take your motion (to strike the testimony of the owner) under advisement." Further at the close of the testimony, Vol. II, 367—"I will instruct the jury with reference to these items when the time comes." Later the court's instructions nullified the evidence, Vol. I, 155-165. Aplt's. br. below, Error XIV, 48 discussed. Instructions, Aplt's. br. below, 15-26. Argued, Prop. Law II, 111. Aplt's. br. below, Vol. I, 172-8.

23.1 Harry. J., Vol. II, 421-3; 441-3. The court assumed without cause the witness's estimate of $600,000 for the term included damages for trade route destruction, good will, and loss of business. So under such erroneous impression the testimony was nullified. Vol. II, 421-443. Error assigned. Aplt's. br. below, XVII, 54; argued under Prop. Law II.

23.2 Fred J.—unusual qualifications as Army Major in charge of Army laundry at Camp Carson, Colorado, and Jefferson Barracks, Mo., Vol. II, 443-58. His testimony re use compensation, $570,000 for 3.6 years, Vol. II, 454-5, excluded "loss of customers, routes, loss of business, or good will." Vol. II, 458-9. Ruling of court on objection was, Vol. II, 460, "I will instruct the jury on these items when the proper time comes." Inst., Vol. I, 157-162 and Inst. denied, Vol. I, 172-8.

23.3 Aplt's. br. below, Error XX, 63. Instruction of court specifically renouncing the witness, Fred J., Vol. I, 157; renouncing A. L. J. testimony, Vol. I, 156; renouncing Harry J. testimony, Vol. I, 156. Errors, Aplt's. br. below, XVIII, 56; XIV, 48. Briefed and argued Prop. Law I, 89; II, 110. If the itemization of what the owners had in mind to base their "use" compensation contained items not compensable as the trial court viewed them, the specific items should have been ruled out rather than the denunciation of the court finally saying, after the above comments (Vol. I, 157), "With these considerations in mind, how are we going to find the

pensation except damage to trade routes, business and good-will. Nevertheless the evidence was excluded by definite instructions of the court.[23.5]

17. In each instance, as shown in footnote 23, 23.1, 23.2, 23.3, 23.4, 23.5, the court either ruled out the testimony or by specific reference to each of the three owner-witnesses renounced their testimony so completely that the jury were left with no practical solution but to find as desired by the government witnesses.

18. There were three principal government witnesses:

(a) C. R. Crowder, who never used, bought, or sold laundry machinery and equipment, nor was he familiar with such property or the plant in 1942.[24] He was one of the assistants in the office of the Army Engineers. He went about the city to pick up information here and there about cost of repairs and replacements of such machinery and equipment. He was not a contractor or builder's architect. He was permitted over objections to testify, and compiled his own hearsay exhibits, 594 of them, over ob-

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fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *" Next the court said in his instructions, Vol. I, 159, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate." Aplt's. br. below, Errors I-H, 18 and I-J, 19. Also errors on refusal of instructions; Aplt's. br. below, Error III, 21-5.

23.4 The court, by giving the instructions IV-b requested by the government, committed reversible error in a condemnation suit, because the jury were told to disregard evidence that did not appear anywhere as evidence during the trial. Error, Aplt's. br. below, 25-6; Vol. I, 164. These were: "interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily * * *." Argued and briefed, Prop. Law III. Aplt's. br. below, 124, stating: "The conduct of the trial must be proper, or reversible error results." Citing 144 Neb. 325, 329-333, 13 N. W. 2d 168. Court of Appeals rule limiting pages to 85 stopped further discussion, but the error is obvious and elementary.

23.5 Vol. I, 157-162.

24. Vol. III, 656.

jection,[25] which were received as "official government documents," and so volunteered by the trial court to the jury[26] to appellant's prejudice. Mr. Crowder stated that the cost to restore the entire building, painting, and all else would be $37,521.34; that it would cost $20,471.27 to restore the machinery where it was in 1942, less ordinary depreciation, including excessive use; and $1,750.40 for other items of replacement. His estimates total $59,743.01. No other figures were offered by either side that were less than this amount for the restoration of the building and the equipment, power plant, etc. Nevertheless, without evidence from any source, the jury found that this total damage was $45,776.03. ("Rental" $252,000; all damages, $45,776.03; total judgment based on jury's verdict, $297,776.03.)[27]

(b) Witness Weber who never ran a laundry, who never bought or sold laundry machinery or equipment, and was not a laundryman, stated as a professional appraiser[28] for the government that the total rental for the 3.6 years should be $70,000 per year, or a total of $252,000. That was exactly the sum the jury found. Under the form of the Exhibit 22[28.1] and the court's instruction[28.2] that interest on the separate sums would produce a proper result, no other conclusion was left for the jury.

(c) Lewis D. Sholes, for the government, a real estate man who never bought or sold any laundry machin-

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25. Vol. III, 634-5, Ex. 17.
26. Vol. III, 648; 692; 641, Ex. 18; 654.
27. Vol. I, 95-6.
28. Vol. III, 735-7; 723; 725; 728-9; 735-7; 744; 747; 749; Ex. 23, 750; Ex. 22, 735.
28.1 Vol. III, Ex. 22.
28.2 Vol. I, 159.

ery or equipment, never operated a laundry, was permitted to testify that the annual rental, including excessive use, should be $65,663.00 per year, plus additional costs of restoration above normal depreciation of $16,680.00. Mr. Sholes' total of all compensation was for the period $253,066.80.[29]

19. In the opinion of the Court of Appeals[30] the court said, "The jury's verdict was well within the evidence. While the total award was much less than the amount claimed by the company, it is exceeded by about $40,000.00, the highest estimate made by any government expert witness."

20. This will be seen from the record was not the fact. While the trial court is the judge of the credibility of witness and the admission of evidence, nevertheless these abuses of discretion are so numerous as to sum up to an unfair trial generally. The Court of Appeals should have so found.

21. It will be seen by a careful analysis of the exhibits above referred to and which were received in evidence over objection, that the jury's verdict was less than the estimate for restoration made by Mr. Crowder ($59,543.01) by approximately $15,000.00. The verdict for the "rental" was that fixed by the witness Weber ($252,000.00) and was almost identical with the total sum for all purposes fixed by the witness Sholes for the government.

22. Under the instructions of the court for all practical purposes the jury was denied the right to consider any evidence of the petitioner's witnesses generally, and

29. Vol. III, 775-8; Ex. 24, 776-9-80-3-4.
30. Vol. IV, 14.

therefore these government witnesses' figures were forced upon the jury by the court.[31]

23. Error has thus been committed, and substantial justice has been denied as hereinabove shown by proper reference to the record.[32]

24. All the foregoing were set up as points relied upon for reversal and each was specifically argued and discussed in appellant's briefs before the Court of Appeals, Eighth Circuit.[32] By stipulation of counsel the points relied upon for reversal below were presented in the brief below instead of in the record.[33] Each error was discussed and argued under the propositions of law applicable in appellant's brief below.[32]

A summary of the evidence on the estimated cost to restore and replace property destroyed discloses the following:

Admitted by Court Govt. witness Crowder's estimates for restoration of damages to structures.		Appellant's witnesses rejected except Dahlquist.		
Bldg. & Painting	$37,521.34	Bldg. (Kiewit)	$53,970.00	Rejected
		Painting (Steinheimer)	17,281.00	Rejected
Machinery	20,471.27	Boilers (Hanighen)	21,678.00	Rejected
		Boilers	6,183.00	Rejected
Replacements	1,750.40	Mach. & Equip. repairs (Dahlquist)	34,309.42	Received
(Received)	$59,743.01		$133,421.42	Rejected

(See footnotes p. 10 supra.)

31. Vol. I, 157-162.

32. Aplt's. br. below left with Clerk of U. S. Sup. Ct. for proof of proper discussion of points to the Court of Appeals.

33. Vol. I, 142.

25. The Jury's verdict for estimated restoration damages was $45,776.03.[34] The petitioner, of course, could not argue to the jury any item to contradict Crowder except Dahlquist's $34,309.42 by virtue of the rejecting of these exhibits and testimony by the court as above shown and all carefully indexed to the record in the foregoing footnotes.

26. Title 40 U. S. C. §257-8 (a) (appendix Aplt's. br. herein) specifically provides that in questions of procedure the state practice shall be followed. No substantial right would have been denied the government by the admission of the testimony of the witnesses Kiewit, Steinheimer, and Hanighen in rebuttal to Mr. Crowder's. These witnesses for petitioner are reputable men in their respective lines of business. They wholly discredited witness Crowder's statements. The trial Court ordinarily is the last word in such matters but that court shall not abuse its discretion when grave injustice obviously will result.[35]

27. Written pleadings are required under the Nebraska practice.[36] The court struck all of petitioner's answer.[37]

The trial Court reversed itself by first stating this very rebuttal evidence would be allowed because as the trial proceeded, petitioner offered evidence of before and after values, offered evidence of total values at time of taking for purposes of use value; then to meet the court's theory offered evidence of use value all as above

34. Vol. I, 95; 101-7.
35. Vol. III, 823; 828-9; 831-8; 847.
36. Appx. p. 21 this brief.
37. Vol. II, 183.

related. This evidence was all either denied at the time of offer or substantially ruled out by the court's instructions, as above shown in the footnotes. Consequently, when the anticipated restoration costs of $133,421.42 were offered in rebuttal to meet the Crowder testimony of $59,743.01, and was rejected, this further grave error by the trial Court occurred. It was not merely procedural irregularity (56 Neb. 600, 77 N. W. 120). Under 28 U. S. C. § 391, Jud. Code § 269, as interpreted, the ruling out of any competent testimony affecting substantial rights of one party gives grounds for examining the entire record and granting retrial to insure that justice will be done.[38]

28. The following table may be used to illustrate the manner in which petitioner was denied interest from the date of taking in violation of 40 U. S. C. 258a:

Date of Order of Taking	To What Date	Dates of Deposit	Amount	Date Withdrawn
Nov. 21, 1942 (I, 2)	June 30, 1943	June 21, '43	$30,140	Feb. 1, 1944 (I, 53)
May 11, 1943	June 30, 1944	Apr. 6, '44	50,000	Apr. 13, 1944 (I, 59)
Aug. 12, 1944	June 30, 1945	Aug. 10, '44	50,000 (I, 68)	Aug. 18, 1944 (I, 72)
May 28, 1945	June 30, 1946	Aug. 8, '45	65,000	Aug. 11, 1945 (I, 89)
Judgment $297,776.03 April 9, 1946		June 11, '46	98,124.27	Aug. 16, 1946 $75,000.00 (I, 135)
Pd. by purchase of govt. mach.		Mar. 23, '46	18,089.55 (Stip. I, 134)	

38. Vol. III, 812; 815; 826-831; 831; 833-5; 847; 857-9; 863.

29. The petitioner claims interest at 6% on the $297,776.03 judgment as additional damage for the taking, beginning with the date of the taking to the time elected by the government to terminate the taking, June 30, 1946. The property was declared surplus and abandoned to the Company on March 23, 1946 (I, 97). Admittedly from the date the funds shown on the foregoing table were paid into the Registry of Court, the 6% would abate. There remains in the Registry of Court under court order and by stipulation of counsel some funds to avoid satisfaction of the judgment pending appeal (I, 139) (U. S. C. 258(a). Appendix p. 6.

30. The court granted no interest whatever on $45,766.03 of the judgment which was the award for restoration damages to repair and restore the property, the responsibility which was cast upon the laundry company to do what it could best do with this money. The court should have granted interest at 6% thereon from the date of taking on November 21, 1942. Instead of granting interest on $252,000 at 6% from November 21, 1942 (except on the payments made on the deposit made in the Registry of Court as above shown), the court after trial treated each year as a new taking without reference to the original time of taking, and by so doing the petitioner in the judgment rendered was denied $21,314.72, at time of judgment, for interest as additional compensation under the said Statute (40 U. S. C. § 258a). This denial of interest was assigned as error, discussed, and argued to both courts below. Neither court would correct this point relied upon and argued as shown.[39]

39. Vol. I, 101-7; Vol. I, 97, motion in arrest, for new trial. Vol. I, 107.

31. Further the court refused to grant interest on $34,875.50 in supplies that were condemned and taken by the government on November 21, 1942, and not paid for until July 8, 1943. This interest up to the time of the judgment on April 9, 1947, amounted to $1,307.11. Both these items of interest were properly before the trial court[40] and the United States Court of Appeals. Neither granted the interest claimed. The federal statute cited clearly covers the situation of allowing interest as contended by petitioner. Both items now aggregate in excess of $25,000. The statute refers to interest from date of taking for all purposes and makes no such permissive exception as erroneously made by the trial court and affirmed by the Court of Appeals.[41]

32. The trial court erred in refusing to allow $3,153.97 expenses before the appraisers (Vol. I, 40), as taxable costs. These should follow the final judgment.

ASSIGNMENT OF ERRORS
with Discussion and Argument

Summary: Did the trial court commit reversible or harmless error under 28 U. S. C. § 391, Jud. Code § 269, and the decisions applicable to fair trials, (1) by refusing to admit evidence, (2) by refusing to receive certain ma-

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40. Assigned as Error Aplt's. br. below, 66, argued, on pp. 125-6. Contained in Answer stricken, Vol. I, 30. Pet. in error, I, 51(2). Discussed by Court, Vol. II, 183; Motion in arrest of judgment denied, Vol. I, 98, III. Motion for new trial denied, Vol. I, 198(4). There was no disagreement regarding this item and when paid. The facts are not in dispute. The government claims because it voluntarily paid the item and the check was accepted, that concluded the matter. However, the supplies were "taken" along with all else. Payments may be received without prejudice to further rights under Sec. 258a U. S. C. Title 40 2.

41. Vol. I, 95; 101-7 (Judgment on Verdict) Vol. IV.

terial evidence offered, (3) by receiving certain evidence over objection, (4) by giving the court's instructions considered all together, (5) by refusing to give certain instructions requested by petitioner, (6) by the court making innumerable comments before the jury that obviously were made to carry into execution by the jury the court's wishes rather than witnesses' statements, and (7) by overruling the motion in arrest of judgment and overruling the motion for new trial. Vol. I, 40; 97; 107.

II.

Is not the opinion of the United States Court of Appeals in error by stating that the judgment reflected all the elements of value which lawfully might be considered in determining the issue of just compensation to which the petitioner was entitled and that no errors of law were committed by the trial court that would warrant a reversal? The record shows thirty-two points relied upon for reversal, each of which was discussed with record page references given. (Aplt's. br. below, 14-88; discussed and argued Prop. L. I, II, III, and IV, Aplt's. br. below, 89-124.) These references sufficiently refute the opinion of the court below that most of the points relied upon for reversal "are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation." Such statement in the opinion becomes important because the court held, "errors assigned, but not argued in this brief, are waived." (Vol. IV, 6-7.)

[All these questions were presented to the Court of Appeals as shown by the index in the footnotes and Rec-

ord references herein above given under Statement of the Case. The trial court procedure and the judgment were affirmed; Vol. I, 95; 101-7; Vol. IV, 3-14.] Infra, pp. 34-108.

III.

In attempting to arrive at just compensation, was it not error for the trial court to deny the petitioner the right to prove the fair, reasonable market value of its plant as it was at the date of taking, when the evidence shows that the condemnor took and destroyed, as a direct result of the taking, with knowledge that such damage would result, all the existing routes constituting the most valuable of the component parts of the composite property? (Aplt's. br. below, Error XIII, 44-7; supra 8-9; 12 with footnotes.)

IV.

Did not the trial court err in ruling out the evidence of the petitioner that it was completely and entirely driven from business by virtue of the taking and could not re-establish itself because of the obvious result of the taking, and the delayed "piecemeal" pay plan adopted by the government? (Table, supra, p. 19; Error XIX, Aplt's. br. below, p. 61; Prop. L. II, 109; Vol. II, 437-9; supra, 5[3].)

V.

Did not the trial court err in rejecting audits of the petitioner company, competently prepared, from which might be argued the facts that any dealer for the property for any purpose would desire to know? (Vol. II, Ex. 1-7, 188-221; Error VII, Aplt's. br. below, 28-33; argued Prop. L. I, 95-8; supra, 6.)

VI.

Did not the trial court err in rejecting the evidence of the competent witness, Judd, who offered to prove for the consideration of the jury in assessing petitioner's damages the actual value of the trade routes in the course of business and as an inherent part of the business of this servicing company, and who offered to prove what it would cost the petitioner based upon the experience of that company in the City of Omaha to re-establish those routes over the succeeding three years after the plant was abandoned to the appellant? (Supra, 9-12; Vol. II, 367; Ex. 14, 370-1, 372, 376, 380. Error XV, Aplt's. br. below, 51, and XVI, 53. Discussed, Aplt's. br. below, Prop. L. I, 89.)

VII.

Did not the court err, after the petitioner's case was closed, by permitting a government witness (Crowder), who failed to qualify properly as a competent authority on costs, to give his estimates of the probable cost to restore the property, including the building and machinery, which estimates consisted of 594 hearsay items, and over objection, the court remarking in the presence of the jury that such 594 documents were "government documents" and "official reports" and with such prestige were admitted? (Aplt's. br. below, Error XXVI, 70; argued Prop. L. II, 109; cross-exam., Vol. III, 641; 648; 656-669. Supra, 16-21.)

VIII.

Did not the court err in receiving the evidence, over objection, of the government witnesses (Weber and

Sholes), neither of whom was qualified to state that the fair, reasonable compensation for "temporary use" was a sum of money based upon their idea of interest on the value of the building separately, the machinery and equipment separately, and the land separately, as appraised by these witnesses themselves, when the witnesses themselves could give no precedent in the laundry business or any other business for such a method for just compensation, when the court had before it a more fair and just method of arriving at just compensation by the difference in the values of the property before and after taking, or by fixing a percentage compensation based upon the fair, reasonable value of the whole property as a going concern at the time of taking? (Weber, Vol. III, 721-757; Error XXVII, Aplt's. br. below, 72-5; argued Prop. L. II, 111. Sholes, Vol. III, 760-801; Error XXVIII, Aplt's. br. below, 75-8; argued Prop. L. II, 111. Supra. 17, 18.)

IX.

Did not the trial court err in nullifying the evidence of the three officers and owners of the company when they offered their estimates of the fair, reasonable rental value of the physical assets, exclusive of good will, trade routes, and trade name, when such witnesses were the only qualified witnesses to give such testimony? And further, did not the trial court err in withholding its ruling on the government's objection to such testimony and then condemning and rejecting it by instructions thus leaving no other testimony before the jury on such subject, as stated in the instructions of the court except the "expert witnesses" who gave as a proper measure of damage, interest on land, building, and machinery? (H. A. J., Vol.

II, 421-443; Error XVIII, Aplt's. br. below, 56-61. F. J., Vol. II, 454, 460; Error XX, Aplt's. br. below, 63-4. A. L. J., Vol. II, 367; Error XIV, Aplt's. br. below, 48-51. The court's instructions, Vol. I, 152-161. Error I, Aplt's. br. below, 15-19. Argued, Prop. L. I, II, Aplt's. br. below, 88, 109. Supra, 15-16.)

X.

Were not the composite instructions of the trial court so at variance with both the facts and the applicable law as to substantially prejudice the rights of the petitioner by denying it just compensation, even under the measure of damage plan adopted by the court for the conduct of the case? (Court's Inst., Vol. I, 157-165; Error I, Aplt's. br. below, 15-19; Prop. L. III, 124. Inst. requested by petitioner, refused, Vol. I, 172-8. Supra, 12-15.)

XI.

Did not the court commit reversible error in refusing the rebuttal testimony of the petitioner's witnesses to rebut the government's witnesses on the probable cost to repair and replace the broken parts of the building, machinery, equipment, boilers, and power plant, especially under the indefinite plan for measuring damages finally adopted by the trial judge? (Aplt's. br. below, 82, 83, 87; argued Prop. L. III, 124. Petitioner submitted as a Prop. L. that: "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605; 77 N. W. 120) although properly in the main case"; supra, 19-21).

XII.

In an action in condemnation for just compensation, is it error for the court to instruct the jury that the case

before them is not one for "damages" but is an "inquest"? (Error I-g, Aplt's. br. below, 16. Discussed Prop. L. I, 88; Vol. I, 154-5.)

XIII.

Did not the court commit reversible error when it instructed the jury to disregard evidence on a subject—naming it—which was entirely absent from any testimony or evidence offered or received by either side at the trial? The court instructed the jury to allow just compensation "without any sentimental values, without any good will, or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (Vol. I, 159; Error I-i, Aplt's. br. below, 18; Prop. L. II, 109.)

Also "You are not to consider the fact that the owners of this property have a sentimental value there, having spent a lifetime working to build up the institution and they did not want to sell." "You cannot take into consideration the fact that these brothers and their families did not want to sell their property or did not want to lease it." (Vol. I, 154.) Also the many similar expressions concerning matters not in evidence, Vol. I, 155-6.

XIV.

Did not the court err in failing to interpret 40 U. S. C. § 258a as amended (appendix) as granting petitioner as a matter of statutory law 6% interest on the entire judgment of the jury from the date of the taking? Did not

the court err by deciding without judicial precedent 6% interest only from the beginning of each fiscal year as if in fact there had been a separate taking of the same property at the beginning of each fiscal year? (Error XXII, Aplt's. br. below, 66; argued Aplt's. br. below, Prop. L. IV, 125.) To the same effect, did not the court err in failing to grant interest on $34,875.50 of laundry soap, chemicals and other supplies condemned and taken on November 22, 1942, but not paid for until July 8, 1943? Points raised in answer, Vol. I, 30; stricken Vol. II, 183; raised in pet. in error, Vol. I, p. 52; raised again in motion in arrest of judgment, Vol. I, 98, overruled; and in motion for new trial, Vol. I, 108, overruled; judgment entered denying interest as claimed, Vol. I, 103-7. Error XXII, Aplt's br. below, 66; Prop. L. IV, 125; 40 U. S. C. § 258a. (Infra appendix of this brief.) (Also the denial of costs before appraisers of $3,153.97, Vol. I, 40, was error, and should follow the judgment.)

XV.

Did not the trial court commit reversible error when repeatedly throughout the trial and in its instructions to the jury stated that the law announced by the Supreme Court of the United States in *U. S. v. General Motors Co.*, 323 U. S. 373, decided January 8, 1945, and in *U. S. v. Petty Motor Co.*, 327 U. S. 372, decided February 25, 1946, required the court to instruct that no damages could be considered (Vol. I, 155); just compensation must be limited to "rent" to the exclusion of other competent measures of damages of record (supra, 7-14; 19), figured as an arbitrary rate of interest on the land, the building, and the machinery, separately valued (Vol. I, 153) with an additional sum, exclusive of general depre-

ciation, for the estimated or probable cost to repair and replace broken parts? (Trial court refused to set case for trial until General Motors case decided, Vol. I, 74 and 60; motion for new trial, Vol. I, 124, pars. 2-6; Court's Inst., Vol. I, 152; Vol. II, 230-32.) Court made ruling to limit petitioner's case to "rules laid down in the Utah case and in the Chicago case, the General Motors case." Vol. II, p. 232. Neither of said cases involves the taking over from the owner a going concern to be run and operated by the army for its use as the same enterprise, as in the case at bar.

XVI.

Did not the United States Court of Appeals commit error when it held that the decisions in U. S. v. General Motors Co. and U. S. v. Petty Motor Co. were its authority for stating, "We cannot accept this proposition of law"? The said proposition of law is Prop. L. I set forth in petitioner's brief in the court below, 89, and is copied from the opinion below, Vol. IV, p. 8, as follows:

> "When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the non-compensable items of good will, loss of profit, and loss of further business. If it is proven that these

routes would be destroyed as a natural consequence known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

(Evidence on factual matters embraced in above statement of the law was rejected by the trial court. Cf. points relied upon for reversal, Appellant's brief below: Error VI discussed, 27; VII, 28; VIII, 37-8; XIII, 44-8; XV, 51-2; XVI, 53-4; XVII, 54-5; XIX, 61; XII, 43. Errors argued in the Propositions of Law, Aplt's. br. below, Prop. Law, 89-109.) (Court's Inst., Vol. I, p. 154, stated: "Under the Constitution and under the law, you cannot make any allowance whatever for property that is not taken.") Supra, 6-13.

XVII.

Did not the court err by failing to properly interpret and apply the condemnation statutes (supra, 3; found in appendix to this brief) relied upon by the government in its petition (Vol. I, 4-5) filed November 21, 1942, and the same statutes pleaded in defense by the condemnee in answer (stricken, Vol. II, 183) and in its requested instructions (refused, Vol. I, 172), principally in the following particulars:

1. These statutes should properly be interpreted in pari materia.

2. When so interpreted, Section 171, 50 U. S. C., as amended, does not clearly cover the case at bar, because the condemnee possessed land but did not possess "the

temporary use thereof or other interest therein." Instead, the government created a "temporary use" of its own by its petition. In so doing it took over an operating company indefinitely but with power to terminate.

3. The result of the taking rather than the form of the petition determines the extent of the condemnation for the purpose of paying just compensation for the taking, and this power of determination of just compensation is lodged exclusively in the judicial branch of the government.

4. Congress has protected previous owners and the government as well by enacting Section 722, as an amendment to the Act of October 16, 1941, 50 U. S. C., entitled, "Return of Property to Original Owner." So that the value before and the value after or when returned to the previous owner or offered to, has been legalized in this statutory manner. Prop. L. II, Aplt's. br. below, 112-123, brought this point to the attention of the Court of Appeals. It failed to recognize the point.

5. This difference in the value at time of taking and at time of return, while recognized by Congress and as a proper method by competent courts, was erroneously denied the laundry company in this case (cf. petitioner's instr. refused, Vol. I, Inst. No. II, 172; No. X, 175; No. XIII, 177; No. XIV, 177. Answer, Vol. I, pleading the statutes, Vol. I, 21, at pars. XV, XVI, XVIII, 28-9. Order striking same, Vol. II, 183; Vol. I' 863. Motion for new trial, Vol. I, 107, overruled. Special exhibits comprising these statutes were attached to the motion, Vol. I, 126-134. Error in striking them from consideration set forth and discussed, Aplt's. br. below, 26; Prop. L. argued I and II, Aplt's. br. below, 89, 109.

All condemnation statutes in question are copied in full in the appendix to this brief.

The references above to "Aplt's. br. below" are on points for reversal herein presented with same numbers, I to XXXII following.

POINTS RELIED UPON FOR REVERSAL HEREIN AND IN COURT BELOW WITH DISCUSSIONS AND ARGUMENT

[All oral testimony and all rulings of the court, the court's instructions (I, 150-169), instructions tendered by petitioner (I, 172), exceptions (I, 165), and the rulings on all evidence and objections are set forth verbatim in the record. As above stated, counsel agreed to the designation of the record (I, 145). Only some of the voluminous exhibits are given in part, as clearly indicated, and the remainder are described by agreement of counsel (I, 143-9). All else in the record is printed verbatim.]

[Under decisions and rules where error is predicated upon evidence offered and rejected the proceedings thereon must be set out in full. Accordingly that has been done.]

I.

(Appellant below is Petitioner herein.)

The court erred in giving the following as portions of its instructions to the jury (I, 150), *because the statements are in conflict with the court's instruction that was given that the petitioner was entitled to the fair, reasonable market value of its property as of November 22, 1942, and was entitled to be placed in as good a position pecuniarily as it was on November 22, 1942.*

I-a

"The court has gone further and said that the measure for juries and courts is the fair, reasonable market value of the property at the time it is taken. That rule worked very nicely in actions where they took the fee title. * * * " (I, 152.)

I-b

"The trouble, however, comes from the fact that there is no fair market price for the temporary use of laundries for a term of months." (I, 153.)

I-c

" * * * but when we come to deal with laundries, there is no evidence of anyone having rented a laundry for three and one-half years, or three years and seven months. There is no evidence of any laundry having been sold on the market." (I, 153.)

I-d

"This case is being conducted in the nature of an inquest to determine just what our position is, and in making that inquest, we have to gather and consider any fact or circumstances that may be considered and keep within the line of just compensation. * * * " (I, 154.)

I-e

" * * * The property taken was the use of the laundry machinery, the building, the grounds, and everything connected therewith, except the trucks or delivery service that was not taken. Under the constitution and under the law, you can not make any allowance whatever for property that is not taken." (I, 154.)

I-f

"In search of a yardstick, I have permitted evidence here of the value of the property itself. Not

that it was necessary for the purpose of the measure of damages, but it was a yardstick that we might consider in trying to find what was just: As I have said, there is no evidence of any sales, there is no evidence of any leases, or anything of that kind in connection with laundries." (I, 154.)

I-g

"* * * The fact that the Kimball Laundry Company undertook to place some element of value on the property, since it was a going concern, is not permissible, and is not competent. It is not the thing that we are appraising here on that we are holding the inquest on. The reason for that is that this is not a damage suit. * * *" (I, 155.)

I-h

(I, 156) "In this case I properly permitted the owners of the property to give their opinion of the value of the property. It developed in the cross-examination of these owners, when they were fixing the figures that they used, that they were considering elements they had in mind that were not proper to be considered.

"The first witness in that respect is Mr. A. L. Jacobberger. On his cross-examination, after fixing what he considered a fair allowance, he was asked what the elements were that he had in mind and he referred to the fact that there was additional expense he would be put to as a result of the taking of the business. In this expense there were many different items, some of them being storage of merchandise that was not taken, storage of trucks that they had been using on their deliveries, storage of customers' clothing, and these items he had considered in making up his figure. He also testified that as a result of the taking he had taken into consideration that he had been put to the expense of apprais-

als and audits and matters of that kind; expense that ran into the neighborhood of eight or nine thousand dollars. None of these items are allowable in this action because they are personal to the owner. The property taken has nothing to do with this, and so I instruct you that these elements Mr. A. L. Jacobberger has referred to should not be considered by you in appraising his opinion of the value of the property, and you should not consider any of these matters he has seemingly included in making up his sum total.

"In addition to Mr. A. L. Jacobberger, I find that Mr. Harry Jacobberger, in his cross-examination, referred to the elements he had taken into consideration. He testified that he had taken into consideration the fact that the plant was a going concern. That is not an element of just compensation, and you are instructed to disregard it.

"Mr. Fred Jacobberger, when he testified, was asked what elements he took into consideration and among other things he thought they were entitled to an amount he fixed, stating that he would certainly ask it of anyone (I, 157) who wanted to rent the place from him. He also testified to a figure for taxes, insurance and a few minor expenses, such as storage of these trucks. These are elements you cannot take into consideration. You may consider taxes and insurance in a collateral way in trying to get at a rental value.

"With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *"

I-i

"* * * In that you consider all of the elements figuring what it would cost to put the property back as it was, as near as you can, allowing just compen-

sation for the use of the property, without any sentimental values, without any good will or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (I, 159).

I-j

" * * * If you can not find an expert who is in a position to qualify and tell you that it is worth so much money, then you have to figure it out for yourself by considering what it cost when it was built, how it has been used, what its capacity is—all of these things that will occur to you when you are trying to arrive at a value. Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it whenever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here. * * * " (I, 159.)

I-k

" * * * Your question is the value of the property at the time it was taken, not now. It is the value of the use of the property and when we get your figures the court will then allow such interest as the law permits. * * * " (I, 161.)

The Kimball Laundry Co. was granted exceptions (I, 166) to each and all of the foregoing instructions.

II.

The court erred in overruling the following Exceptions of Petitioner to the Court's Instructions:

II-a

(I, 165) "Mr. Hotz: The respondent, Kimball Laundry Company excepts to that portion of the Court's instructions which referred to the words 'going concern' taken from the testimony of Mr. A. L. Jacobberger and Mr. Harry Jacobberger, for the reason that in their testimony they specifically excluded, under the rulings of the Court, all reference to trade routes, business and good will, and so stated in their testimony.

"2. That the instructions are not explicit enough in reference to the matter of the element of damage based upon the value of the property, especially the laundry machinery and equipment as it existed in November of 1942, and at the present time. While the instruction was given, it seems to counsel for Kimball Laundry Company that it was detracted from and modified in the subsequent instruction that seemed to leave to the jury no other alternative but the repair items to place the property in the condition that it was in 1942.

"3. That the reference by the Court to consequential damages not being permitted is contrary to the law and the decisions in the United States Circuit Court of Appeals for this circuit and that consequential damages which inhere in and are directly connected with property and are destroyed, are a part there of and become an element of damage for the consideration of the jury.

"4. That the word 'rental' as used by the Court in the instructions and also as referred to in the general verdict (I, 166) of the jury submitted by the Court, is not a proper term either under the statute or the decisions, and while it may be used as an illustration, it is contrary to law, as it all is a matter of damage for use, whether temporary or permanent.

"5. The Kimball Laundry Company further excepts to the failure of the Court to give all of the instructions requested by the Kimball Laundry Company, being numbers—

"The Court: You will get specific exceptions on those.

"Mr. Hotz: We except to the instructions given by the court from instructions suggested by the government, numbers 1, 2, 3, 4, 6 and 8, and especially in connection with Instruction 6, because of the element of consequential damages therein referred to. The general exception is made that the court has failed and refused at this time and throughout the trial to recognize as an element of damage the destruction of the trade routes and the customers lists because of their contractual relationship to the Kimball Laundry Company and as an element of damage inhered in and as a part of the property.

"The Kimball Laundry Company also objects to the request for the findings of different elements to make up the total damage, it being the law that the damage should be fixed in one lump sum and that the only purpose in arriving at the separate elements of damage is to aid in arriving at the one sum of damages."

"The Court: The exceptions will be noted and overruled and the instructions in that regard will stand as they are. * * *."

II-c

(I, 167) "Gentlemen, my attention has been called particularly to the fact that there was testimony offered by Mr. A. L. Jacobberger and Mr. Harry Jacobberger with reference to an item of $70,000.00 which they said would cover the use of the property while they were putting it back in shape. I withdrew

that question from your consideration by retaining jurisdiction and any question that may arise hereafter as to any damage in that respect, the court will then be in a position to take care of. You can not anticipate now that there will be any such occasion arise. Have I made myself clear? . . . "

III

The court erred in failing to give the following instructions requested by the petitioner:

III-a

(I, 174) No. VI. (Not Given)

"You are instructed in a condemnation proceedings when you arrive in your deliberation at the value of the property as a unit, to consider its special use to the Kimball Laundry Company as a laundry and dry cleaning establishment; and the criterion or test of what the value was on November 22, 1942, is not what the property is worth to the condemnor but its value to the condemnee, Kimball Laundry Company. The question is what has the owner lost, not what has the taker gained."

III-b

No. X. (Not Given)

(I, 175) "You are instructed that the Government took from the Kimball Laundry Company the temporary use of land and the personal property thereon or used in connection therewith. You are instructed that the term included the Kimball Laundry Company's property on the northwest corner of 15th and Jones Streets, and that it covered the land, the five-story building, all the machinery and equipment contained therein, and the (I, 176) power plant and power equipment, and all personal property used thereon or connected therewith excepting

the Kimball Laundry Company's delivery trucks; that said property at the time of the taking was run and operated by the Kimball Laundry Company as a fully equipped modern and efficient laundry and dry cleaning establishment, located in the business section of the City of Omaha, and that said property was of such capacity as to service the volume of business necessary for the Government needs, and that all these elements of value should be combined by you in arriving at the value of said plant as a unit on November 22, 1942. And in arriving at your conclusions of value you shall take into consideration the trade routes established by the Kimball Laundry Company as distinguished from the loss of business or good will. If you find that said trade routes, both residential and commercial and others, had a definite intrinsic value, readily determinable; that the Kimball Laundry Company was under obligation to service said trade route customers and was doing so at the time of the taking; and that by the taking these routes were destroyed and became valueless to the Kimball Laundry Company—then you shall include that trade route item, in addition to all other items of value, in making up your award for damages and include the same in the total."

III-c

(I, 176) No. XI. (Not Given)

"You are further instructed that in arriving at just compensation to be paid to the Kimball Laundry, you may take into consideration the value of the customers' routes, the number of customers, the volume of business; and if you find that such customers' routes and customers had a value which inhered in the Kimball Laundry Company's property as a part thereof and that the same was damaged or destroyed directly by the taking, then you shall find for the Kimball Laundry Company to the extent of the value

of the routes so destroyed in the taking, even though you find the Government had no occasion to take and did not take or operate said laundry's customers' routes."

III-d

(I, 177) No. XII. (Not Given)

"You are instructed to find the total value, rather than the separate value, of the parts of the Kimball Laundry Company that inhered in the property at the time of the taking. In that regard there is before you separate evidence of the value of the real estate, the machinery, the equipment, the power plant, and other elements, each separately valued. These are before you separately only to show the value of the total or the value of the whole laundry as it existed on November 22, 1942, when taken by the government, and you may not value each item separately and add them to make up the whole, but instead you must value the whole plant as a going unit, and determine its value in dollars and cents for the purpose of arriving at just compensation."

III-e

(I, 177) No. XII. (Not Given)

"You are instructed that it is not necessary for you to gauge the damages for just compensation to be paid by the government in terms of a percentage of the land, a percentage of the building, and a percentage of the equipment, as the measure of your verdict, but you may gauge the full measure of your award based upon what you consider fair and just compensation for the taking of the whole. In determining just compensation to be awarded for this property for the period in controversy, you may consider the after-value of the porperty and subtract it from the before-value; that is, the value as it existed

on November 22, 1942, and substract the value of the property at this time."

III-f

(I, 177 No. XIV. (Not Given)

"You are instructed that the petition filed by the Government in this case condemned a temporary use of said premises, and that the property sought to be condemned was only the physical assets, exclusive of trade routes and business. However, if you find from the evidence that the effect of the taking, even though the petition states 'temporary use,' actually resulted in appropriating the Kimball Laundry Company as a going business with the result in effect that said property was completely (I, 178) taken from the Kimball Laundry Company, then you are instructed to find the fair, reasonable market value of the Kimball Laundry Company at the time of the taking on November 22, 1942, with all the elements that go to make up the value of a large going laundry and dry cleaning business and render judgment in favor of the Kimball Laundry Company for said amount. In such event you are instructed that the real and personal property would remain as an asset of the Government for the purpose of resale to the Kimball Laundry Company or to some other purchaser or to remain the property of the federal Government if it so desires, in which contingencies you need not be concerned in this action."

IV.

The court erred in giving, over petitioner's objections, the following instruction to the jury requested by the government:

IV-a

(I, 163) "Here are some instructions that have been requested by the government and they are like

wise entitled to consideration because they are given to you by the court and correctly state the law."

IV-b

(I, 164) "The jury are instructed that the just compensation to be paid in this case is the value of the property taken, in this case, the right to use the physical property. Only in the sense that the owner is to receive this value is the owner to be put in as good a position financially or pecuniarily as if his property has not been taken. This value is not the value to the owner for his particular purposes or to the condemnor for some special use, but a so-called 'market value.' Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are not to be considered in determining just compensation in this proceeding. Interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily, or the need of the government (I, 165) for the property are not to be considered and are not to be the basis for the allowance of just compensation. You will, therefore, disregard all evidence of such items.

"The jury are instructed that no consideration shall be given to or allowance of just compensation made for any litigation, auditing and appraisal expense incurred by the owner and evidence of such expense shall be disregarded. * * * "

V.

Error by striking pleadings of petitioner.

The court erred at the outset of the trial on March 4, 1946 (II, 183), in striking all of petitioner's answer

(filed August 23, 1943; I, 21) and all of petitioner's petition in error on appeal from the board of appraisers (filed December 18, 1943; I, 44), and in striking during the trial on March 20, 1945 (III, 863), another petition on appeal (filed March 18, 1946; I, 91). No rulings were made on the petitioner's application for pretrial hearing filed on April 3, 1944 (I, 55), including request for pretrial decision on propositions of law (I, 126). The court at the opening of the trial had presented to it the motion of the Kimball Laundry Co. that the court "follow the State of Nebraska practice and procedure as nearly as may be in this condemnation case (40 U. S. C. 258a)." (This statute in 40 U. S. C. is found in appendix herein, pp. 4-5.) Exceptions were allowed (II, 183). Error occurred in these rulings because petitioner was placed in the trial without the issues being formed in writing as provided in both the federal and state courts in condemnation proceedings (State Court statutes, appendix p. 15). The prejudicial result of this group of errors during the progress of the trial will appear in conjunction with other resulting errors set forth (II, 183-7) hereinafter.

VI.

Error in court's assumption that the petitioner claimed damages for good will. How question arose.

The court erred throughout the trial in assuming without any supporting evidence that the petitioner was claiming damages to its business and good will as distinguished from trade routes as elements of value. The contrary appeared of record from the statement of the witnesses. Page reference will be made to this testimony.

The court's first ruling is II, 187. (Whenever the name of counsel "Murphy" appears, he was counsel for the government.)

> (II, 187) "Mr. Murphy: Petitioner objects to any statement of counsel as to the value of the laundry truck routes or the value, or supposed value of the business or good will as incompetent and immaterial and not within the issues in this case, and not within anything taken by the government in this action.
>
> The Court: I think that is true. Let us keep away from the question until we can meet it squarely on the evidence you offer. Let's confine your opening statement to matters that will not be in dispute until you get to them."

VII.

Error in rejecting all of petitioner's financial statements.

The court erred in ruling out all the audits made by the petitioner's first witness, C. L. Hillmer, whose qualifications were admitted and who had made all the audits for the company for 26 years. The books of original entry were in the courtroom (II, 187-8). These audits ruled out by the court were complete. Gross income from laundry operations from 1924 to date of condemnation was shown to be $6,728,454.64 (II, 190; Ex. 1). Among the disposition of funds were shown officers' salaries, $393,242.99 (II; 191); dividends paid $147,900 (II, 191). and other items customarily needed to determine the value of a plant. These were ruled out as follows:

(Ex. 1)

"The Court: That objection will be good. You will have to separate the years so that we can determine which is remote and which is not. Mr. Hotz: In the exhibits that we have that are following we do that by the growth of the business and the productivity. The Court: Let us get the foundation. We will do the figuring afterwards. Objection will be sustained." (II, 189-90.)

(Ex. 2)

Exhibit 2 of the witness Hillmer was refused (II, 198). It showed all costs on the books to the company on December 31, 1942, exclusive of good will, trade name, and advertising. The itemized total was $683,365.77. The advertising during the period 1924 to 1942 was $148,910.01 (II, 200; Ex. 2), and contributions to charitable and business organizations, $5,119.50 (II, 200; Ex. 2), both were charged to expense and not capitalized as good will.

(II, 198) "The Court: These statements include so many other items as to confuse the issue. You have the books here and if he has these statements separately, we will be glad to have them and examine them. It will probably save time by doing that. Otherwise, you have book values and date and amount that was paid and when you get the evidence, we will determine whether or not it is of evidential value, or whether it is too remote, or whether it is within the time of reason."

This ruling is contrary to the face of the exhibit, and the court erred accordingly.

(Ex. 3)

Exhibit 3 contained the same items as Exhibit 1 except was the 5-year period from 1938 to December 31,

1942. For that period Exhibit 3 showed officers' salaries, $112,676.84; repairs to building, $10,995.63; repairs to equipment, $29,531.14; purchases of equipment, $30,940.18; dividends paid, $97,900; and other items shown (II, 201; Ex. 3). This exhibit was ruled out with Exhibit 2 (II, 198) for the same reason: It was not "remote."

(Ex. 4)

Exhibit 4 was refused (II, 203-4). It was a comparative statement and analysis of net profit, itemized year by year from the beginning of the business in 1924 to November 21, 1942.

"The Court: Due to the fact that this exhibit contains items that I think it should not properly contain in its present form, I must exclude it, but if counsel will segregate in a separate statement the item showing the net earnings of this laundry from 1924 to 1942, until November 1942 (II, 203), and the other item of depreciation taken, I will receive it. I can not receive it with a lot of other items I think should not be in here.

Mr. Hotz: There were no other items excepting incident to the laundry business. They are comparatively in the second column—for example, you take the year 1924, the net profit from laundry operations before deducting depreciation and income tax, giving the date and certain figures; the net profit from all sources before deducting depreciation and income tax, is the same figure, and it goes on down. There are comparatively small items and interest and things of that sort that came from their surplus account. It does not amount, over a long period of years even, to a great deal. Column One shows their total net profit from laundry operations, shows the total of that up to November 21, 1942. Then it shows the income tax paid. Naturally that might be of in-

terest to know what that is. It might have probative force to see what that is. Then depreciation taken on income tax returns—that means on the whole plant—and net profits after deducting depreciation and income tax, but that second column hasn't any great significance, and if they had their surplus in the bank and got a little interest on it, that was shown properly as a matter of bookkeeping and accounting.

"The Court: The Court has ruled." (Refused.)

(Ex. 5)

Exhibit 5 (II, 206) shows for the 10-year period to November 21, 1942, a total net profit of $598,512.35 before deducting depreciation, income taxes, and officers' salaries. It then shows officers' salaries, income taxes, depreciation taken for income tax purposes, the net additions to surplus from laundry operations, of $121,458.14 (II, 206), and the surplus account increase from $173,538.26 in 1933 to $195,336.61 at the time of taking in 1942. The court ruled out the exhibit and stated (II, 205):

"The Court: That will be sustained. Prepare a statement. I will not permit anything to go to the jury except what I think is competent to be received."

The court did not state what was competent to be received. The statements contained in this exhibit and the accompanying Hillmer audits were exactly in accordance with proper bookkeeping methods to show the status of a business concern about which a buyer would wish to learn. The refusal was error.

(Ex. 6)

Exhibit 6 was a comparative balance sheet showing the growth of the company by years to the date of taking. The amount of invested capital, the officers' salaries drawn each year, the increase or decrease in the investments in fixed assets, cost of real estate, building, laundry machinery, power machinery, dry cleaning equipment, cold storage equipment, feather machinery, office equipment, etc., each set forth (II, 214). Also the comparative balance sheet separated into shorter term, as suggested by the court, showing the percentage of cost to repairs to the building year by year (II, 217) and the percentage of repairs to the cost of machinery and equipment year by year (II, 218). The cost of equipment as of 1942 at the time of taking was $405,294.81, and $205,035.12 cost of the building at time of taking (II, 217). This exhibit was ruled out, the court stating (II, 212):

> "Mr. Hotz: I offered the whole exhibit and not the one page, because the exhibit is a composite exhibit. It is a comparative balance sheet and unless it is offered with the balance of the exhibit it is almost unintelligible. I offer the exhibit in its entirety, Exhibit 6.
>
> The Court: It is the ruling of the Court that all of the exhibit is incompetent and not material to the issue, the second to the last page, which may be received, if counsel so elects."

The court erred in so ruling, because it was evidence to support the fair, reasonable market value of the Kimball Laundry Co. as it stood on November 21, 1942, exclusive of trade name, good will, and future business, and similar items which were not in controversy and were not included in the exhibits.

(Ex. 7)

Exhibit 7 shows gross income of the Kimball Laundry Co. year by year, itemized from 1924 to November 21, 1942. It was refused by the court. The purpose of the exhibit was fully explained to the court (II; 219-221). This exhibit did not show net profits. It was a gross dollars and cents volume of business, upon which the petitioner based its estimate of $400,000 as its annual gross business at the time of taking—an increase from a low of $274,913.90 in 1933. When considered with other Hilmer exhibits, or separately, the value of the property taken, because it was productive, was material. The court erred in ruling out the exhibits.

VII(b).

Offer to prove contents of all foregoing exhibits from books in court was erroneously denied.

At II, 221-3, an offer was made to prove the contents of the exhibits from the books of record and of original entry in the courtroom, with which the witness Hilmer was familiar. The exclusion from evidence of all these exhibits is assigned as prejudicial error, because the petitioner was left with no figures upon which to base the financial condition of the petitioner, or its gross income, its earnings, the cost of its property as carried on its books in 1942, or any other similar data. Expenditures for repairs and upkeep of the machinery and equipment were ruled out. Obviously the court did not seem to understand that the exhibits actually contained all the evidence essential to show value, not warehouse space, floor space, or similar data not in the case,

but for a going business dealing only in services, not merchandise, upon which laundrymen would base value.

VIII.

Witness McDougal's audits on trade routes.

(Ex. 10)

The court erred in ruling that petitioner's Exhibit 10, compiled by witness McDougal (II, 234), which showed the dollars and cents income from 1936 to November 21, 1942, broken down into various classifications of laundry and dry cleaning services to show value of the plant, could be received only under the following conditions (II, 230, 234-5):

> (II, 230) "Mr. Murphy: If the Court please, petitioner objects to the offer of Exhibit 10 for the reason said exhibit is incompetent and immaterial and covering, as it does, solely business earnings, is not a proper element of proof of just compensation in this condemnation action. I might state to the Court that I have in my hands a copy of an opinion of the United States Supreme Court just handed down on February 25, 1946, that I would like to have—

(Counsel was referring to *U. S. v. Petty Motor Co.*, 327 U. S. 372, 66 S. Ct. 596.)

> "The Court: I have it right here. I have not had time to study it yet. I got it just this morning. You have this in dollars and cents. I am inclined to think it is admissible if it were in poundage or volume so as to establish the amount of business they were doing."

The court remarked (II, 231):

"* * * This document, if it showed the poundage, or if it could be supplemented with a statement of the poundage, would show to some extent the capacity of the building and of the plant, what it was capable of doing, and this would be a consideration that a prospective lessee and the owners would necessarily have in mind if they were dealing at arm's length. Under the Utah case, as under the General Motors case (323 U. S. 373, 65 S. Ct. 357), that which is personal to the owners can not be considered. I can not allow it to interfere with the valuation or determination by the jury of the value, which is the basis of our inquiry. Any kind of evidence, even though it is remote, I have concluded that the Court should permit because of the difficulty in proving up in this case, and since this case has to stand by itself—it is the only laundry business that I know of—it is surely the only one in Omaha, and there are no records or decisions on laundries. Consequently, we have the problem of how to prove up in Nebraska in condemnation of laundries. * * * "

These two cases (discussed under points of law hereinafter) do not govern the measure of damage in the case at bar, because in the Petty Motor Co. case a leasehold was condemned which the condemnee had for storage space, and the expense of moving and relocation were denied because the condemnee's lease was at an end. In the General Motor Co. case the condemnee also had a long term lease which the government wanted but only a part, and the court ruled the damages were recoverable for the expense of moving and relocation and destruction of equipment, obviously because the removal from the warehouse of the General Motor Co. would be only temporary and the company would then move back. It was a simple matter of square foot rental plus resulting losses enumerated.

In the case at bar the condemnee owned the property outright. It had no temporary use. The court erred, therefore, in ruling out all exhibits and evidence which would show the fair, reasonable market value of the Kimball Laundry Co. at the date of taking. This valuation was absolutely necessary for petitioner's starting point during the trial of the case. The value of what was turned back when the property was declared surplus and abandoned would likewise be material evidence for the jury's consideration as the measure of damage.

The court erred in denying the exhibit and its only understandable purpose, i. e., dollars and cents income from the various departments, as a "laundry plant."

At II, 234-5 the court stated:

> "The Court: I made the remark that if he would break it down into quantity so that we could understand the capacity of the plant it might be descriptive, and if he would give me that assurance I would receive it now in the record, with the understanding that if he does not supply the supplemental evidence that I will strike it."

The witness McDougal stated (II, 232-3):

> "Q. When we had Exhibit 10 yesterday while you were on the witness stand, a statement was made with reference to poundage, if you had any record of poundage. Did the Kimball Laundry Company keep any record of laundry as bundles distinguished from pieces?
>
> A. We did on certain types of laundry, but that wouldn't cover your laundry, due to the fact that there is no poundage on your finished shirts.
>
> Q. There is no poundage on many other items?

A. And many other, there is no poundage in the laundry business.

Q. For instance, in the dry cleaning?

A. No poundage on your dry cleaning."

In reference to the poundage demanded by the court as a qualification for the ultimate use of the exhibit, the objection was made to the court (II, 230) in speaking of poundage,

"Mr. Hotz: That doesn't mean anything unless you can tell what it is in dollars and cents."

The total for the 5-year period of gross business immediately preceding the taking on November 21, 1942, in that laundry on laundry operations alone was $2,496,105.55. This figure was broken down into nine subheadings as shown at II, 234, and duly certified by the auditor.

It was error for the court not to have admitted Exhibit 10 (II, 234), and all it was worth to show valuation of the laundry when it was taken, because this statement, coupled with the audits of the witness Hillmer (Exs. 1-7, all of which were ruled out except page 6 of Ex. 6) was a clear, definite, and acceptable financial statement of this particular laundry upon which other laundrymen might testify as to valuation.

(Ex. 11)

The court erred in limiting the value of the witness McDougal's Exhibit 11 (II, 236-7), showing the total regular trade route customers, exclusive of specialty department, on November 21, 1942, to be 15,093; customers who delivered laundry and called for it at the desk of the company, 1,500; special customers, 4,648; customers

requiring seasonal work consisting of table linen, spreads, rugs, comforts, blankets, and lace curtains, 20,802; or a total of customers of 26,950, plus 15,093, or a grand total of 42,043 in which there were no duplications (II, 237).

> (II, 236) "Mr. Murphy: * * * It is evidence relating solely to skill or management and good will and number of customers and business, rather than the plant or its capacity. The Court: I think it is some evidence of capacity. * * * "

The exhibit showed

> " * * * The Government went into possession of the Kimball Laundry on November 22, 1942, and none of the customers of the Kimball Laundry Company were or have been thereafter serviced by the Kimball Laundry Company."

(Ex. 12)

Exhibit 12 (II, 241) was an itemization of the name and amounts in dollars and cents of the Kimball Laundry Co. patrons under the heading of "Special Accounts for the Years 1938 to Nov. 21, 1942, Inclusive." These the court received with Exhibits 10 and 11, with the same admonition that it was only for the purpose of showing "volume," and (II, 240) "conditionally that you couple it up with the poundage." The court erred in keeping from the jury elements of valuation based on understandable dollars and cents items, as poundage meant nothing to either the court or the jury.

(Ex. 13)

Exhibit 13 (II, 244) was refused by the court. This exhibit was made up from 1936 to November 21, 1942,

and showed the expense incidental and the manner in which the respective trade routes were built up and handled during that period of time. The offer was made to show that the route men were paid $237,654.83 (II, 244) of guaranteed salaries and salaries and commissions during the previous five years as an item of expense to keep and maintain trade routes.

> "The Commission Account following is for laundry trade acquired and held by these routemen over and above their fixed salaries for the years 1936 to November 21, 1942, inclusive."

The court stated in ruling out the exhibit (II, 244):

> "The ruling is based on the proposition that the route was not taken, was not condemned, and is not involved in the suit."

Error was committed, because the routes were destroyed by the taking as a matter of common sense deduction.

IX.

Court's error in the limitation placed on Ex. 21, which showed cost and value of machinery and equipment on November 21, 1942, and in November, 1945, by experts Goodwin and Kinder for petitioner.

The court erred in limiting the value of the petitioner's Exhibit 21 (II, 258-60), consisting of 594 items of machinery and equipment valued at $336,976.09. The expert witnesses on values were from the American Laundry Machinery Co. and had both appraised laundry machinery and equipment for the government. The witness Goodwin had appraised the same items with the govern-

ment witness Sholes when the plant was taken over in November 1942 (II, 246). (Original Vol. III, 1066-1 to 1066-23; print II, 258-9.) The witness Kinder qualified as an expert (II, 252), and had done laundry appraisal work for the government (II, 252-3). These witnesses found the fair, reasonable market value of the machinery and equipment in November, 1945, was $120,699.75 (II, 260), and when the plant was taken on November 21, 1942, was $273,831.39. The difference in value was $153,131.54 (II, 260) during that period of time. Ex. 21 was offered by the petitioner for the purpose of showing the value of the particular items when the business was abandoned and declared surplus by the army on March 22, 1946 (I, 97; II, 310-11).

Further explanation of this exhibit was given by the witnesses that in the blank space in column 3 under the "Value Installed Nov. 1945," there was $11,492.31 of items that were in the laundry plant on November 21, 1942, but could not be found when the appraisal was made in November, 1945 (II, 254-8). The court erred specifically in reference to this exhibit of the petitioner by ruling out the element of cost of the particular machines to the Kimball Laundry Co.

While the court permitted the value in 1942 and 1945 to go in, the purpose of the exhibit to show damages by the difference was ruled out by the court's instructions to the jury that only fair rental for use was involved and extraordinary damage. The hard usage shown reduced the value of the machinery, and it was error to instruct the jury that there was no method to judge the measure of damage, when obviously the difference in

value before and after the taking herein shown, was clear and explicit (Error supra, pp. 34-39) (Infra 64-67).

X.

The Latenser exhibit on reproduction building cost as of 1942.

The Court erred in limiting the scope of the effect of the petitioner's Exhibit 19 (II, 264), the witness being John Latenser, Jr., the architect who built the building and installed all the mechanical parts such as heating, plumbing, etc. The exhibit gave the cost in 1925 and the additional cost in 1935 when the building was improved and one story added. The reproduction cost in November, 1942 was $280,348. The court stated in response to the objection that the various columns in Exhibit 19 were of no value, and (II, 263):

> "* * * and with that as a keystone (the figures in the three columns), we could then ascertain what the fair, reasonable rental value of that property would be. For the reasons stated your objections are overruled."

The court erred in confining the consideration of the jury to an important item such as the building as an isolated value upon which interest was to be awarded as "rental," as appears from the court's instructions to the jury, rather than the building as a part of the whole plant as claimed by the petitioner (Error supra, pp. 37-38).

XI.

The court's ruling in effect that "poundage" instead of income was the only proper basis to determine value of the property, was error.

The court erred in ruling out testimony of A. L. Jacobberger, 45 years of age, residing in Omaha, who had been in the laundry business since 1918 and was the secretary and operations manager of the petitioner at the time it was taken and continued with 185 other employees in their respective capacities after the taking by government on November 21, 1942, he stated that by the condemnation proceedings "we were put out of business." (II, 266.) The skilled employees were replaced with a maximum of 100 prisoners of war who had no experience in the operation of laundry machinery and equipment. This had its bad effect on the use of the plant.

In order to satisfy the request made by the court on poundage in the examination of the witness McDougal, A. L. Jacobberger offered Exhibit 24 (II, 282-3). Some of the "poundage" was in numbers, such as shirts, there having been 665,357 shirts laundered in 1941 (II, 282). The court erred by limiting the exhibit to show capacity rather than value of the business as a going concern. The exhibit was brought in at the request of the court.

> (II, 282) "The Court: Suppose we agree these documents, and I take it from his testimony they are all alike, show on their face the period they cover, show the amount, and they may be received in evidence for the purpose of showing capacity, or tending to show capacity, without further identification or objection. I will receive your book in evidence, and proceed."

The court then called for a price list and stated (II, 288):

> "The Court: The price list for the year 1942 for all rough laundry. We don't care about the

fancy stuff, because it is too much work to break it down, but there is a lot of laundry, the bulk of it, so that we can get some idea of the capacity of the plant.

"The Witness: The O. P. A. file, price list. There is a copy from the O. P. A. records."

(Ex. 56, "more poundage")

The witness Jacobberger produced Exhibit 56 (III, 862) which showed the capacity of certain machines, which is evidently what the court desired. The court erred because after receiving the capacity of machines and poundage (III, 862), there was nothing concrete or practical upon which the jury could judge fair, reasonable market value of the plant on November 22, 1942. Error is therefore assigned to this last ruling of the court, principally because the financial statements (Exs. 1-7, Hillmer; II, 188-221) were all ruled out and the testimony of the witness McDougal likewise nullified in connection with the customer's lists and amounts (II, 229-244), because confined only to capacity rather than in support of the financial worth of the company.

XII.

Plant unsafe at time of trial.

The court erred in ruling out testimony of the witness, A. L. Jacobberger.

(II, 297) "Q. Is the condition of the machinery and equipment now in the building of the Kimball Laundry Company, known as the Kimball Laundry Company, as shown on Exhibit 21, in such condition that the plant could be operated by the Kimball Laundry Company?

Mr. Murphy: Objected to as irrelevant and immaterial; going into a matter of business operations and not the condition of the machinery, and not the best evidence.

The Court: Sustained.

(II, 298) Mr. Hotz: We offer to show by this witness that the plant can not be operated at all at the present time by the Kimball Laundry Company owing to the destruction of certain machinery which the witness is ready to describe and show is necessary for the operation of the laundry, and the only reason that it has been operated by the government is that the government itself has put in a temporary machine to perform the operation, but that the machinery of the Kimball Laundry Company in that respect is gone and the plant can not be operated at all."

The court erred when it said in the presence of the jury:

(II, 298) "I can go down and operate one by myself and I don't know anything about a laundry."

This testimony given by the court itself was highly prejudicial and was erroneous for the court to have so stated.

Further proof is shown from Exhibit 22A, a letter from the commanding officer, Col. E. F. Ketcham, of the Corps of Engineers, addressed to the Kimball Laundry Co. on January 11, 1946 (II, 310-11), which stated that the boiler was unsafe and that:

(II, 311) "4. These instructions should be issued in writing and posted with the laundry officer in charge and the chief operating engineer in order that the lives of the operators will not be endangered during the remaining few weeks this laundry will be operated by the Government.

By Command of Major General Craig:

E. F. Ketcham, Colonel, Corps of Engineers
Deputy Service Command Engineer"

XIII.

Fair market value at date of taking denied.

The court erred in prohibiting the witness, A. L. Jacobberger (II, 273-9), from giving the fair, reasonable market value of the property on November 21, 1942 (II, 312).

"Mr. Hotz: I am asking for the fair and reasonable market value of that property as described in this real estate description (from petition).

* * *

(II, 313) The Court: That is the question the jury is to determine, and that is the value that we are trying to get now. They did not take your property. They took the use of your property.

Mr. Hotz: They have to start out with a valuation of some sort.

The Court: The valuation is the valuation of the use. We showed the value of the property, or thought we did, through the testimony.

Mr. Hotz: We have a lot of things here and I want to get the owner's value of the property.

The Court: Objection sustained. Try it again.

Q. What is the fair and reasonable value of all of the property down there at the Kimball Laundry Company, on November 22, 1942, when it was taken over by the government?

The Court: You mean the fee title; the title to all of it?

Mr. Hotz: The whole business, as he saw it down there—the whole thing as an operating company down there at that time.

The Court: Not as an operating company. You can show, and I have permitted you to show the value of the property that was used. If you want to sum it up with him in total, round figures, do that, but beyond that you will not be permitted to go properly. Do you understand what I mean, Mr. Witness? A. I understand what you mean, but I can't answer this question—

Mr. Murphy: You said you couldn't answer that question, isn't that true?

A. I can answer the question he asked me, yes.

The Court: Suppose you tell me what you value all that property at, at the time they took the use of it away from you; that is, the real estate and the machinery and everything in the building. What do you consider the fair market value of that property?

A. Of the Kimball Laundry Company?

The Court: Kimball Laundry Company; that is, the building and the machinery, aside from your trucks and your routes and your good will, and all that sort of thing (II, 314). We are asking you simply for the fair market value of the property in anybody's possession.

Mr. Murphy: May I suggest that the question be limited to the physical property?

The Court: I thought I did that."

The court stated (II, 315):

"The Court: Let the record show that in response to the request of Mr. Hotz, the court listened to counsel on arguments of the lawyers for a matter of half an hour and now reconvening, you may present your question and get a ruling upon it, Mr. Hotz.

Q. What do you consider the fair and reasonable market value of the Kimball Laundry Company at the time of the taking, exclusive of the delivery trucks, exclusive of good will, and exclusive of loss of business?

A. $987,000.00.

Mr. Murphy: Just a moment.

The Court: Strike the answer and the jury will disregard it.

Mr. Murphy: Petitioner objects as incompetent, irrelevant and immaterial; not within the issues of this case; the question being the value of the Kimball Laundry Company.

The Court: That will be sustained.

Mr. Hotz: We offer to prove by the witness that the value of the Kimball Laundry Company on November 22, 1942, was $987,524.32, exclusive of the delivery trucks, exclusive of any element of good will, and exclusive of the loss of profits, and that this item was made up of the fair and reasonable market value of the building, of the machinery therein, the power plant and customers routes of this particular laundry, which had been (II, 316) built up over a period of ten years from $275,000.00 to $400,000.00 of gross income in ten years, and that these customers routes consisted of those shown on Exhibits 10, 11 and 12; and that these routes were inhered in that property as a part inseparable therefrom, and that they were destroyed in the taking. Further itemizing this figure, the witness will testify, comes about through $280,348.00 of the value of the building; machinery and equipment therein at $273,831.39; power equipment and incidental installations connected therewith, $62,928.08; land, $30,000.00; and as a capital asset, the trade routes evaluated by numbers of customers of different kinds, $340,516.85; that the purpose of the

testimony is to show the difference in the value at the time of the taking and at this time, and that in the return of said property there is only left in actual value as of this time to the Kimball Laundry Company $426,208.28, and that the proper measure of damages is the difference between said two, of $561,316.04; that there exists no accurate measure of evaluating these properties other than a showing, and that these are all in accordance with accepted principles of accounting in the laundry business.

Mr. Murphy: Petitioner objects to the offer for the same reasons as to the question.

The Court: Will you inform me, does the offer follow the discussion we have just had and present the questions for the record that were raised by his offer and by your objections thereto?

Mr. Murphy: I think it does. I think the offer is perhaps a little broader, going more into detail, but involving exactly the point in issue.

The Court: Is that so, Mr. Hotz?

Mr. Hotz: Yes, sir.

The Court: With that assurance of counsel, the court will not take time to have the offer read. Following the rule heretofore made, the offer is refused and objection thereto is sustained."

At this point in the proceedings at the trial, this valuation, exclusive of good will and loss of business, was material, and it constituted prejudicial error to have it stricken and the witness, A. L. Jacobberger, an officer, denied the right to answer.

XIV.

The evidence of A. L. Jacobberger of value of "use" also stricken.

The court erred at the close of the testimony of A. L. Jacobberger (II, 367) in effect sustaining the motion of counsel for the government to strike all the testimony of A. L. Jacobberger in reference to the witness's opinion of the fair, reasonable market value for the use of the premises from November 22, 1942, to June 30, 1946, to be $570,000.

(II, 317) "Q. Do you understand we want now your figures that you consider agreeable for the temporary use of this property up to June 30, 1946, and I might say, do not include in that anything in reference to trade routes or loss of profits, because the court has passed upon that. Get your (II, 318) figure down to something you can explain, after you give it.

. . .

The Court: That is the fair market value of the use of the property as of November 22, 1942, through June 30, 1946, or three years, seven months, eight days; together with the damage which has been enumerated by the witness, added thereto, so that you may state it in one item. Is that what you are requesting, Mr. Murphy? Is that right?

Mr. Murphy: Yes.

Mr. Hotz: Yes.

. . .

A. That is exclusive of these other things—a total of $570,000.00."

On cross-examination from II, 319-65, the witness Jacobberger justified his figures. Nevertheless, at the close of his testimony, the court made the following comment (II, 365), which carried the matter of admissibility to the instructions, where the court definitely stated to

the jury there was no evidence of the value of the use by anyone (Instructions supra, pp. 34-41).

(II, 365) "Mr. Murphy: Petitioner now moves the Court to strike from the record the testimony of the witness A. L. Jacobberger to the effect that in his opinion the value of the use of the premises here involved for the period from November 22, 1942, to June 30, 1946, is the sum of $570,000.00, for the reason that said figure under the testimony of said witness constitutes and comprises and is made up of certain figures and factors not recoverable herein and not constituting items of just compensation, nor evidence of just compensation, and which said (II, 366) figures and factors are incompetent and immaterial and constitute in some instances purely business items and in other instances constitute duplication of other figures and factors likewise included in said total figure.

Petitioner moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value of $570,000.00 in the testimony of this witness, A. L. Jacobberger the sum of $16,400.00 identified by said witness as covering costs of storage of trucks and other items not involved in this action, and also including business expenses of audits and appraisals in connection with this action and not constituting compensable items in this action.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger and to entirely disregard the item of $50,000.00 to $75,000.00 constituting a part thereof as testified by said witness, and which said sum comprises, speculative business expense items anticipated as possibly arising at some future date and entirely

after the period of possession of these premises by petitioner.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger, and to further disregard the item and sum of $11,327.00, constituting depreciation on the power plant, for the reason that said item and figure constitutes a duplication of and is also included in the claim of damage to said power plant in the sum of $32,667.55, as shown by Exhibit No. 23, and constituting the full difference in value of said power plant as of the time of taking and as of the present date, and which last mentioned figure includes all depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

(II, 366) Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 from the testimony of this witness, A. L. Jacobberger, and to entirely disregard the further sum of $65,098.00, constituting claim of depreciation to that extent on the laundry machinery here involved, for the reason that said last mentioned sum constitutes a duplication and is included and covered by the figure and claim of $153,131.54, constituting the difference in value according to respondent's own witnesses of the said laundry machinery between the date of taking and the present time, and which last mentioned figure includes all items of depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

The Court: I will instruct the jury with reference to these items when the proper time comes. The record will show the same ruling."

Later instruction of the court and the sustaining of the motion to strike the testimony of the witness, A. L. Jacobberger, on II, 315; 367, constituted reversible error (supra, pp. 34-39; 64-70).

XV.

The witness Judd denied right to prove $340,516.85 as the value of the trade routes as part of the damage.

The court erred in striking the testimony of the witness, Harry E. Judd, a certified public accountant, of Omaha, Nebraska, for 22 years, identified with a responsible firm, a law school graduate in 1924, and an expert in laundry valuations in which he had specialized in the course of his audits and examinations.

Exhibit 14 (refused; II, 370) identified by the witness and compiled by him, gave the trade's valuation of $20. for each of the 15,093 trade route customers; 50c each for the 4,648 pillow customers; 50c each for the 6,810 table linen customers; 50c each for the 5,814 rug and blanket customers; 50 each for the 8,178 lace curtain customers; $10 each for the 1,500 call customers; and for the 44 commercial customers producing $34,253.13 revenue for 47 weeks during 1942 equals $728.79 per week at 15 times that amount when summed together in accordance with Ex. 14 (II, 370) gave the total value of the customers served at $340.516.85. This exhibit was prepared by the witness Judd from the data on the books and records of the Kimball Laundry Co. and in accordance with trade practice. (Adopted by the U. S. Tax Court as a proper method of evaluating of laundry routes.) Objection was made and sustained by the court (II, 368):

(II, 369) "Mr. Hotz: We offer to prove by the witness the contents of Exhibit 14 and the conclusions therein to be in reference to the standard method used by laundries in evaluating customers and trade routes, and the witness also will testify that the same has been used and adopted in the case of Metropolitan Laundry Company before the United States Board of Tax Appeals, Volume 2, U. S. B. T. A., Page 1062, and more particularly Page 1066; and also in the case of Pioneer Laundry Company found in Volume 5, U. S. B. T. A., in the case of Pioneer Laundry Company vs. Commissioner of Internal Revenue, and especially on Page 822.

The Court: What is it you are referring to in the law book?

Mr. Hotz: It is the similar method that had been adopted in laundry evaluation cases before the United States Board of Tax Appeals.

Mr. Murphy: Petitioner objects to the offer for the same reason as to the question, and for the further reason the offer is broader than the question and calls for a legal conclusion of the witness.

The Court: Objection sustained."

The Kimball Laundry Co. was not a merchandising establishment that had goods and wares to sell to customers. It was a servicing organization exclusively depending upon its established routes for plant valuation.

XVI.

The evidence of the cost per year for three years to reestablish routes destroyed, was denied.

The same witness Judd prepared three additional exhibits on the subject matter of expense to re-establish routes, Exhibits 15 (II, 327-5), 16 (II, 376-9), and 17 (II,

380-3). These exhibits gave the estimated gross income and operating expenses, taken from the condemnee's records and compiled by and with the assistance of Harry A. Jacobberger and A. L. Jacobberger. The net total expense after credit from income was first year, $151,680 (II, 373); second year, $130,366.80 (II, 377); and third year, $130,483.20 (II, 380).

(II, 368) "Mr. Murphy: Objected to by petitioner as incompetent, irrelevant and immaterial, for the reason it is not evidence of the fair market value or fair use value of the porperty taken, and not relating to any issue in this case, and is evidence relating solely to the skill and management, and to matters of the business operations, profits and loss of profits.

"The Court: The objection is sustained."

In each instance the offer was made:

(II, 371) "Mr. Hotz: We offer to prove by this witness the contents of Exhibits 15, 16 and 17, and to prove through the witness the facts set forth in the exhibits.

"Mr. Murphy: Same objection to the offer as to the exhibits and for the further reason that the exhibits themselves are the best evidence of what they would prove.

"The Court: Sustained and offer denied."

Thus, two methods were offered by the witness to prove by nothing speculative or indefinite the value of a laundry's trade routes in the business world.

In view of the instructions given by the court to the jury later and the ruling out of this evidence, prejudicial reversible error resulted.

XVII.

The testimony of the president, Harry A. Jacobberger on fair market value of the plant, and his description of it, were nullified by the court.

The testimony of Harry A. Jacobberger, the president of the Kimball Laundry Co., a resident of the city for more than 50 years and in the laundry business since 1912, gave the history of the organization and the excellent condition of the plant in November, 1942.

(II, 389) "Q. Just explain, in a few instances, what you meant by that when you talked about replacements and repairs and upkeep being in first-class condition. Just give us a short graphic view of what you were talking about, so that we will know.

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial and adding nothing to the statement already made that it was in first-class condition and as good as new.

The Court: Sustained."

The court erred in limiting the witness because of this particular witness's ability. The witness was asked (II, 388):

"Q. What I do want to ask of you, however, is the method that was adopted by you, as president of this organization, as to the condition of the machinery and equipment, and the building, and boilers, and power plant, and all, as it existed on November 22, 1942. My object in asking the question is to get the condition, the present condition of operability of that machinery at that time and that building at that time; what was its condition and upkeep as to rehabilitation, replacement, and so forth. Will you answer, please?"

The witness, Harry A. Jacobberger, gave a description of the building and contents (II, 396-7). He concluded by saying (II, 401):

> "A. The Kimball Laundry Company, in this area, and when I say 'this area' I mean west of Chicago, and I say clear to the Pacific coast, is considered the outstanding model plant. I know it is the practice of most of the machinery salesmen to bring their prospects anywhere in this territory to see the machines they want to sell in operation in our plant. We are considered a model plant by practically every laundry owner, even in Chicago, St. Louis and Kansas City, and places of that type. In fact, they used to say they thought I was crazy for keeping up a plant of that type, sort of a show-room plant. It was my hobby. I enjoyed it.
>
> "Mr. Murphy: I move to strike what he thinks it was. It is calling for a conclusion.
>
> "The Court: That is very true, but I don't know that it is damaging or not on either side. It is just a comment. It is pretty hard to separate that which is comment and proper. Overruled. Let it stand."

The court erred in making this comment. It inferred that there was no positive value to Harry A. Jacobberger's estimate of the type and kind of the plant it was. Later in the court's instructions, the president's evidence was nullified by the court's stating there was no evidence upon which the jury could arrive at "use" value (Inst. supra, pp. 34-41).

XVIII.

Testimony of the president on "use value" asked by the court, was nullified by the court.

The court erred, after requiring by rule of court that the testimony be confined to temporary use, in ruling out the testimony of the witness, Harry A. Jacobberger, on that matter.

(II, 421) "Q. What would you say was the fair value in the city of Omaha on November 22, 1942, of a temporary use that would be made of the Kimball Laundry Company including the land, building, machinery and equipment for a term that would be put to you at that time of three and one-half years, or three years and six-tenths months; that is, a term for temporary use for the whole thing as it was as a unit, for the use of the United States Government, let's say, or any similar person that had necessity for an immediate use?

* * *

(II, 422) "Mr. Murphy: Objected to as incompetent, irrelevant and immaterial, for the reason that it is not evidence of the fair market value or fair rental value or the use value of the property taken and is not related to any issue in this case; is evidence related to the management, to the operation of the business, to the loss of profits, good will and customs.

"Question read.

"The Court: Objection sustained. It is not the proper measure of damages. * * *"

The petition was then read to the witness with this explanation by counsel (II, 423):

"Mr. Hotz: In asking this question to this witness, I am doing it in the light of the rulings of the court that have heretofore been made, that has been excluded, and I think I have explained to the witness so that he won't be complicated with that.

"The Court: What is the occasion for this explanation?

"Mr. Hotz: I don't want the witness to be misunderstood, as Mr. Murphy is, that I am trying to include something that is more than the land, building, machinery and equipment.

"The Court: Why get it so complicated? We are trying to find out what his opinion is of the use of the property that was taken, as described in the petition. What further explanation is necessary? You may answer the question, if you understand it.

"The Witness: I am not sure. You want the entire value of the property?

"The Court: Yes, value for the use of the property for these three years, seven months and eight days, on the 22nd day of November, 1942. Its value as of that date. A. In my judgment that woould be about $600,000.00."

This evidence in the witness's cross-examination explained (II, 423-5) how he arrived at the amount given, and also on direct examination as a basis for his estimates for the term "use" (II, 396-423). At II, 440, counsel for the government stated:

(II, 440) "Mr. Murphy: At this time petitioner moves the court to strike from the record and to instruct the jury to entirely disregard the testimony of this witness Harry A. Jacobberger as to the rental or use value of the property in question at $100,000.00 a year, a total of $360,000.00, for the reason that said [illegible] and figure, according to the testimony of the witness himself, is based upon and is his opinion of the value to the Kimball Laundry Company of this property as a going concern, and is therefore not a proper measure of damages and not within the issues of this case."

"The Court: Objection overruled, because the testimony, part of it is competent and other matters are incompetent. The court expects, at a later time, to instruct the jury to disregard all testimony pertaining to consequential damages, anything personal to the owner or the owners, and confine their verdict to the property and matters incident thereto. I have so announced at different times. The rule I am administering is pretty well understood. I hope you will confine it within that scope, but we have not been able to, and I will have to deal with it when I come to instruct the jury finally in this case. I announce this rule in advance at this time so that counsel may be advised to spend no time on any of these matters that I have referred to as not being elements of damages coverable in this action, so that you will not be in any way prejudiced by it or taken in any way by surprise.

(441) "Mr. Hotz: I would like to put Mr. Harry Jacobberger on the stand for a moment.

"The Court: Have him come forward."

On redirect examination of Harry A. Jacobberger, the following took place:

(II, 441) "Q. You have heard the colloquy and statement of the court. I will put this question to you, and if you wish to change your testimony, you are privileged to do so. What did you take into consideration when you made the statement in response to the counsel's inquiry or question upon which to base the $100,000.00 per year for the use and the damage, in addition to $220,000.00, to make the $580,000.00 that counsel was talking about when he was cross-examining you? If you want to change your testimony in that regard, or offer any explanation, you may do so.

"Mr. Murphy: Objected to for the same reason as the original question. It is an exact repetition of

the original (II, 442) question, with two or three others involved in it, and indefinite and uncertain.

"The Court: That will be sustained and the court will try to help him out. What did you mean when you said in answer to Mr. Murphy's question that you valued the use of the property as a going concern? What are the elements you had in mind?

"A. I had in mind that if someone came to me and wanted to lease the property for a matter of two or three years, that is what it would cost. That is the consideration.

"The Court: That is, you mean to take over your entire laundry business?

"A. Take over the physical plant and start to operate where we left off.

"Q. Did you mean taking into consideration the customers routes and the trade?

Mr. Murphy: Same objection.

"The Court: Sustained.

"Q. Did you mean physical assets alone?

"Mr. Murphy: Objected to for the same reason and repetition and improper redirect.

"The Court: That will be sustained.

"Q. I will ask you once more whether or not in your statement to Mr. Murphy, whether you meant the rental of the physical assets for the period of three and one-half years?

"The Court: That will not be permitted. It is for the jury to determine what he meant by his testimony. He has repeated it several times. If he wishes to make any change in any of these statements he has made, or if he wishes to withdraw any statement he has made he can do so, but you cannot proceed in this way longer.

"Q. Do you wish to withdraw or change your testimony in that respect?

"A. I didn't know there was going to be any misunderstanding about my statement.

"Mr. Murphy: I move to strike that and ask the witness answer that simple question 'yes' or 'no.'

"The Court: Sustained.

(H, 443) "Q. If you wish to change and withdraw your statement you made as a going business, that is the thing we are getting at. You made the statement, 'As a going concern.'

"The Court: In order to be fair to the witness—we seem to have got him confused. Maybe I have. To be fair to the witness, you may state again, Mr. Jacobberger, what are the elements that you considered as making up your opinion, or arriving at your opinion that the fair and reasonable market value of the use of the building, the machinery and the ground, on the 22nd day of November, 1942, for a term of three years, seven months and eight days was the sum of $100,000.00 per year. Tell us again so there will be no mistake about it.

"A. That is exactly what I meant with reference to the building, ground, equipment and all of the things we had to go with the business over there, to be worth the sum of $100,000.00.

"The Court: What do you mean by 'the business'?

"A. There are a lot of things we haven't enumerated. We have store rooms, cold storage, which is part of the business.

"The Court: We will proceed with the matter no farther.

"Mr. Hotz: That is all.

"Mr. Murphy: That is all. (Witness excused.)" (See Court's Inst. supra, pp. 34-41; Requested, pp. 41-45.)

XIX.

The rejection of evidence of the president of condemnee that it was unable to start business elsewhere and was put out of business entirely by the taking, was error.

The following took place at H, 437-9:

"Q. When this laundry was taken over by the government in 1942, did the Kimball Laundry Company have available to it in the laundry another space where it might have moved?

"Mr. Murphy: Objected to as incompetent and immaterial.

"The Court: Sustained.

(H, 438) "Q. Did the Kimball Laundry Company remain in business after November 22, 1942?

"Mr. Murphy: That is also objected to as incompetent and immaterial.

"The Court: That will be sustained.

"Q. Was the Kimball Laundry able to remain in business after November 22, 1942?

"Mr. Murphy: Objected to as incompetent and immaterial and further, it is an improper question.

"The Court: Sustained.

"Q. Was the Kimball Laundry Company business as a going concern destroyed by the taking on November 22, 1942?

"Mr. Murphy: Objected to as incompetent and irrelevant and not within the issues in this case and having been already ruled on by the court two or three times.

"The Court: That will be sustained and you will not continue that further. You made your record now sufficient, Mr. Hotz.

"Mr. Hotz: I want to read in the offer.

"The Court: That isn't necessary.

"Mr. Hotz: I have always thought so. We offer to prove by this witness, if he were allowed to answer the questions propounded to him, that the Kimball Laundry Company, at the time of the taking was completely driven out of business by the taking.

"Mr. Murphy: Same objection to the offer as to the question, and for the further reason the offer is broader than the question.

"The Court: Sustained. The offer will be denied.

"Mr. Hotz: This offer goes to all four of the last questions propounded to the witness and upon which the court ruled that the witness might not answer.

"Mr. Murphy: Same objection to the amended offer.

"The Court: Sustained. Offer denied.

"Mr. Hotz: Is it customarry to have the exceptions noted of counsel? Are they put in the record?

"The Court: Which counsel?

"Mr. Hotz: Ours.

(II, 439) "The Court: Your exception?

"Mr. Hotz: Yes.

"The Court: They are noted as a matter of course. Under the ruling on everything adverse, you get an exception to, as a matter of course."

XX.

The testimony of Fred Jacobberger, an officer and qualified expert, was nullified by the court's instructions to the jury that there was no evidence of the value of the "use."

The court erred in ruling out the effect of the testimony of Harry Fred Jacobberger, an officer and one of the principal stockholders in the Kimball Laundry Co. He was 33 years of age and at the time of trial was a major in the Quartermaster Corps (II, 443). He was well educated, and was the officer in charge of the Quartermaster laundry at Jefferson Barracks for 2½ years, and the officer in charge of the Quartermaster laundry and dry cleaning plant at Camp Carson, Colorado, for 18 months. After fully qualifying as an expert and being thoroughly familiar with the Kimball Laundry Co. property (II, 443-54), the witness was asked:

(II, 454) "Q. Knowing the Kimball Laundry Company as you do and without taking into consideration anything but the physical assets; that is, the building, machinery and power plant and equipment, what would you say would be the fair sum for the Kimball Laundry Company to receive for the temporary use of that property for a period of three years, seven months and eight days? That is, from November 22, 1942, in the shape it was then?

"The Court: Through June, 1946. From that date, what would that value be as of the 22nd day of November, 1942? A. About $570,000.00.

"Q. That would include the work to rehabilitate and fix up the plant?

"A. Yes, that includes now the restoration of the building, grounds and equipment and power

equipment in the condition it was when it was taken over.

"Q. In other words, to bring it back to where it was in November, 1942?

"A. Yes, and pay us for the temporary use of it.

"Q. You were in charge, I think you said of sales of the Kimball Laundry Company while you were there? A. Yes.

"What did that mean?

(H, 455) "A. I had charge of route men, supervisors. I arranged for the advertising. I arranged price structures in conjunction with Al, and in his absence supervised the production operations of the plant, in return for which, in my absence he supervised the operation of the sales department.

"Q. In this figure you gave $570,000.00, do you include any loss of customers, routes, loss of business, or good will? A. I did not."

This testimony, while permitted at the time, was nullified when the court stated to the jury and so instructed them that there was no evidence of the fair value of the use of this property as condemned (Inst. supra, pp. 34-41).

XXI.

The court denied the witness, Fred Jacobberger, formerly in charge of the trade routes, the right to confirm the accuracy of Exs. 14, 15, 16, and 17.

The court erred in ruling out the testimony of the witness, Fred Jacobberger, to verify the accuracy of Exhibits 14, 15, 16, and 17 (II, 455).

(II, 456) "Mr. Hotz: The accuracy of them. I want him to verify the accuracy of them."

"Mr. Murphy: Objected to as incompetent and immaterial.

"The Court: No one is questioning the accuracy.

"Mr. Hotz: I don't know.

"The Court: I am telling you they are not.

"Mr. Hotz: Very well. These exhibits were excluded and I want to make an offer of proof from this witness.

"The Court: You have already made the offer of proof.

"Mr. Hotz: But not from this witness.

"The Court: It doesn't matter. You have already made the offer of proof, and for the purpose of your offer, they are accepted to be what they purport to be. There is nothing more this witness can add.

"Mr. Hotz: We are referring now to Exhibits 14, 15, 16 aand 17 (II, Judd, 372-383)—

"The Court: And let the record show any further offer of these exhibits will not be permitted and counsel will desist from proceeding in this way."

XXII.

Error by denying 6% interest from date of taking.

The court erred in denying interest at 6%

(a) on $34,875.00 for supplies taken by the government on November 22, 1942, paid July 8, 1943;

(b) on $297,776.93 (the judgment) from November 22, 1942, to April 9, 1946, the date of judgment, less credits on the amounts paid into the Registry of the Court;

(c) on $45,776.03 extraordinary damages from November 22, 1942 to April 9, 1946. No interest was allowed on this item.

[Answer, I, 26(XI); petition in error (I, 51 (2)); petition on appeal (I, 91-5(XI)), stricken (II, 183); motion for new trial re interest (I, 107-8); judgment (I, 103-7); motion in arrest of judgment (I, 97-100).]

XXIII.

Petitioner's expense before appraisers erroneously denied.

The court erred in denying (I, 40) petitioner's motion to allow as damages $3,153.97 expenses incurred to conform to demand to appear before appraisers with audits and expert witnesses to explain to the appraisers information which they required. No court costs were included. [Itemized and explained in I, 41-3; overruled at beginning of trial, II, 183; motion for new trial, I, 108(5), overruled August 16, 1946 (I, 140).]

(These items of cost to petitioner should follow the final judgment.)

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The petitioner, Kimball Laundry Co., rested (II, 460).

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XXIV.

The government proceeded (III, 461).

The court erred in receiving exhibits of the government, identified by the witnesses Moister (III, 461-473) and the government clerk Hergert (III, 473-478), because the testimony went solely to the question of the amount

paid in dollars and cents for upkeep and repairs compiled from government invoices (Exs. 2, 3, 4, 5, 6, 7, 8; III, 462, 464, 466, 477-8, 506). The witnesses had no knowledge whether the work or repairs were made. Also the court excluded petitioner's Exhibit 6, p. 7 (II, 218), showing its repairs and maintenance for comparison. Objection (III, 504) was made that the exhibits were only a part of the government's accounting system, not showing which were capital expenditures and which for maintenance and which for repairs. The objection was overruled and exhibits received (III, 505-7).

XXV

Error of court in permitting the government witnesses to speculate on cost to place the laundry in good state of repair, the government knowing at the time that no repairs were to be attempted by the government (laundry abandoned after trial, I, 97).

The court erred in receiving Exhibits 10, 11, and 12 (III, 557-67) and the testimony of the witnesses, Denton J. LaTurner (III, 546) and Ross J. Newcom (III, 571), because those men were machinists and repairmen who estimated that it would cost $5,021.87 in parts; $3,917.51 in labor; and $2,729.35 to relocate the machinery to its original place in the plant, or a total of $11,668.73 to place the machinery in good repair. The witnesses admitted that neither was stating that his estimate would place the machinery and equipment specified by him in the condition that it was in November, 1942. Neither had seen the property at that time. They had both made their guess at what it would cost to

place the machinery and equipment in operable condition (III, 568, cross by Mr. Hotz of Mr. LaTurner):

"Q. You don't undertake to estimate the value of that machinery and the condition of the machines as they were when they were taken over by the government in 1942? A. No."

Mr. Newcom stated (III, 573, cross by Mr. Hotz):

"Q. In making these observations that you have made as to the conclusions you have drawn and figures you have given, you have made no attempt, have you, to evaluate those machines as they were in 1942?

A. No, sir.

Q. As a matter of fact, you didn't know what condition they were in then? A. Absolutely not.

Q. You haven't attempted in any of the work that you have done, as manifested now and shown in Exhibits 10, 11 and 12, to give any valuations?

A. No, sir."

The court erred in overruling petitioner's objections to government Exhibits 10, 11, and 12 (III, 555, 556):

(III, 555) "Mr. Hotz: Object to the exhibits as self-serving declarations of the witness; not the best evidence; not tending to prove any issues in the case; merely a matter of a compilation of repairs; the witness not showing himself to have examined these machines and equipment in 1942 when they were taken over, and yet, proposes, by the statement that he made, to say he could put them back where they were in 1942.

The Court: That isn't what he said. What he said was that with this money he would put all this

machinery in good workmanship condition, good operating condition. Go back and get the question."

(III, 556) "Mr. Hotz: It is the same objection to Exhibit 11 as to the three exhibits, and we will make these objections to each one of these exhibits. They are made up on forms to be filled out and the witness not having shown himself qualified to give the conclusions that the exhibit calls for, such as restoration, and that applies to all three of the exhibits.

The Court: The court adheres to its former rulings and overrules the objections and receives the exhibits in evidence."

The court erred in the admission of the exhibits, because the witness LaTurner had stated in direct examination (III, 555):

"Mr. Murphy: The Government at this time offers in evidence Government's Exhibits 10, 11 and 12 (III, 557-67).

"Mr. Hotz: May I ask the witness a question or two?

The Court: Very well.

Mr. Hotz: Q. Did I understand that you stated that this would place this machinery in the condition it was when it was taken over by the Government in 1942?

A. That is right.

Mr. Hotz: Q. Were you here in 1942?

Mr. Murphy: Objected to as not proper cross-examination for the purpose stated.

The Court: That will be sustained. Are you objecting to the exhibits?

Mr. Hotz: Yes."

Then follows acceptance of the exhibits as above ruled. Restoration to former condition, and repairs to place in good condition are different matters.

XXVI.

Government witness, C. R. Crowder.

The court erred in receiving the evidence of C. R. Crowder, a government employee (III, 609-760) and the exhibits compiled by him consisting of the witness's estimate of repairing the building, floors, boilers, heating plant, laundry machinery and equipment, dry cleaning equipment, power plant, electrical devices, and all else shown on Exhibits 17 (III, 636-40), 18 (III, 642-45), 12A and 12B (III, 647), and 21 (III, 649-55), to which the following objection was made (III, 634-5):

> "Mr. Hotz: Exhibit 17 is compiled by the witness, or was compiled by the witness, according to his testimony, and it takes in repairs to the building and repairs to the power equipment, such as heating, plumbing, boilers, stokers, and it takes in resurfacing and waterproofing the floors and rehabilitation of the buildings, including terra cotta, concrete work, and painting and structural steel work and elevators, and the witness not having shown himself qualified to have made the estimates thereon; and for the further reason that he is testifying in the capacity of an architect or an engineer who bases the conclusions arrived at, according to his statements, from information that he has received in the most part from others and not accompanied by any bids or binding arrangements with any of the contractors with whom he has talked or obtained his information. That is for Exhibit 17.
>
> The Court: Overruled."

The same objection and erroneous ruling was made for each of Exhibits 18 (III, 641), 12A and 12B (III, 646), and 21 (III, 648).

The witness Crowder went about town gathering information here and there orally, and admitted making his exhibits largely from what persons told him about the costs, shown on the exhibits. His qualifications (III, 656-90) show no laundry experience whatever and that he was an assistant to the engineering staff of the army engineer at Omaha and knew nothing of the laundry in 1942 (III, 666):

> "Q. Then, as I understand it, you did not have any written bids? A. No."

The court erred in ruling on the appellant's objection to government's Exhibit 21 (III, 648) and Exhibit 17 (III, 636-41) by stating in the presence of the jury that those sheets made up by the witness Crowder consisting of an enormous exhibit of 594 items (found original record IV, 1116), and consisting generally of government's Exhibits 17, 18, 12A and 12B (III, 647), and 21 (III, 649-55), admittedly chiefly obtained from oral statements (III, 665-90), were government documents and were considered by the jury (III, 648):

> "The Court: The court has heretofore expressed his opinion of the qualifications of the witness. In addition, my recollection of his testimony is that these are official reports and may be treated and hereafter used as official reports and are made up for that purpose and as such might be in the nature of official documents. Overruled."

The exhibits were gotten up for evidence in the case at bar, because the government was not to repair or re-

store; it was to abandon when declared surplus (I, 97).

These exhibits so admitted were no evidence of damages to the machinery and equipment that existed in the plant at the time of its abandonment (I, 97), but were the unqualified witness's compilation obtained from all sources as to what different persons thought it would cost to place the entire plant in running operation and to restore it. He placed $37,521.34 (III, 640) under the heading of "Restoration to First Class Condition."

The objections to government's Exhibit 18 (III, 642-5) were similarly (III, 648) overruled, and error was committed for the same reasons as above set forth on this witness's other exhibits above described (supra 90-91).

XXVII.

Errors in the admission of evidence and the instructions in the testimony of the government witness, Cornelius G. Weber (III, 721-57).

The court erred in admitting the testimony of the professional appraiser for the government, Cornelius G. Weber, of Milwaukee, of the American Appraisal Co. He made his appraisal in August, 1944 (III, 723) and did not see or appraise the property in 1942. Consequently, the following questions and rulings are in error (III, 728, 729):

> (III, 728) "Q. As a result of your survey, investigation and work which you have detailed, did you arrive at a fair and reasonable value of the entire physical plant; that is, the land, building and power plant and equipment involved here, as of November 22, 1942? A. I have.

Q. What in your opinion was that fair and reasonable value of that entire plant as of that date?

Mr. Hotz: Just a minute. I think you testified you were not here in 1942 and did not see the plant until 1944."

(III, 727) "Q. That is not the Government's Exhibit 19, is it?

A. No.

Mr. Hotz: That we object to the question upon the grounds that the witness has not shown himself qualified, not having seen the property in 1942.

The Court: Overruled."

The witness was permitted to state, although admittedly not a laundryman, that the total fair value of the property taken in 1942 was $455,000, broken down into building, land, machinery, and equipment. The following question was asked by the government's counsel:

(III, 729) "Q. What in your opinion was the reasonable, fair, annual use or rental value of the property we have described—first, give me your total annual rental and we will break it down later?

Mr. Hotz: Objected to as the witness not having shown himself qualified to answer; incompetent; not showing that he has had any experience whatever in rentals, and especially of property of this sort and of laundries; not showing that there ever has been a laundry rented at all to anybody, excepting on a temporary use in a condemnation proceedings, perhaps.

The Court: Overruled."

(III, 735) "Mr. Murphy: Government at this time offers in evidence Exhibit 22.

Mr. Hotz: Object to it as incompetent, irrelevant, and immaterial; not the proper method in arriving at just compensation in a condemnation suit.

The Court: Overruled."

The witness's exhibit showed interest based on his values as "fair rental value," arriving at $70,000 per year, or $252,000 for the 3.6 years, exactly as the jury returned (I, 96(2)), and as the court virtually instructed (I, 159) the jury to find. The Court:

"* * * Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it whenever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here. * * *"

The jury accordingly found exactly as the government's Exhibit 22, prepared by the witness Weber, disclosed (III, 736).

The valuations prepared by the witness, being government's Exhibit 23 (III, 751-7, 752) gives the witness's cost of reproduction, less depreciation as fair market value, of $454,231.77, rather than the fair market value in the market.

(III, 750) "Mr. Murphy: Petitioner offers in evidence Government's Exhibit 23. You have a copy on your desk, counsel.

Mr. Hotz: We object to Exhibit 23 for the reason that the witness has not shown himself qualified to answer; he has not shown himself qualified to give the valuation of a laundry and the machinery and equipment therein on November 22, 1942; for the further reason he did not see the property in 1942, November of 1942; that the test is the fair market

value of that property on November of 1942, and the method arrived at by the witness is incompetent as a method of arriving at valuation.

The Court: His testimony has long since gone into the record. This is merely a notation or summation of the facts and figures that he has testified to and is offered merely for that purpose. It is merely offered for the use of counsel on both sides of the case, and the Court and jury. Objection overruled."

Applying the errors relied upon for reversal regarding the entire instructions of the court (I, 150-61, 167) and those requested by the petitioner (I, 172-8) and the refusal to give them, and the exceptions noted (I, 165-7), when applied to the testimony of the government witness Weber, presents the error in the admission of his exhibits (supra 93-94).

XXVIII.

The court's error in admitting the testimony of the witness, Lewis C. Shiles, a real estate man who became an appraiser for the government (III, 760-801) *both because he lacked qualifications and his methods were erroneously sanctioned by the court.*

(III, 767) "Q. What in your opinion was the fair and reasonable value of the land involved and upon which the Kimball building is situated, as of November 22, 1942? A. $17,600.00.

Q. And in all of these questions, at the moment at least, I am referring to the same date, November 22, 1942, and the premises involved in this action, the Kimball Laundry matter. A. I understand.

Q. What in your opinion was the fair and reasonable value of the building as of that date?"

(III, 768) Mr. Hotz: Objected to, witness not having shown himself competent to give an appraisal of the building.

The Court: Overruled.

A. $190,000.00

Q. And what in your opinion was the fair and reasonable value of the power plant, including the items you have under power plant?

Mr. Hotz: (Objected to), the witness not having shown himself competent to judge values of the power plant.

The Court: Overruled.

A. $12,500.00."

The witness then proceeded to give restoration values without having shown himself qualified.

(III, 768) "Q. What in your opinion was the fair and reasonable value of the machinery and equipment, including all machinery and equipment, everything down there that has not been included in the first three items, as of the same date?

Mr. Hotz: Objected to as the witness not having shown himself qualified to know the value of laundry machinery and equipment installed.

The Court: Overruled.

A. $213,400.00.

Q. What in your opinion was the fair and reasonable value of the entire physical plant, including land, building, power plant, machinery and equipment, as it stood there, complete, on the 22nd day of November, 1942?

A. $433,500.00.

Q. Did you also appraise and determine what in your opinion was the fair annual rental value of that property at that time? A. Yes.

Mr. Hotz: Objected to as incompetent, irrelevant and immaterial; not a proper method of arriving at a temporary use, and the witness not having shown himself competent to judge the value of a laundry.

(III, 769) The Court: Overruled."

(III, 775) "Q. Is this, in your opinion, a fair and reasonable amount, except for that one possible item of some removing and relocating some of the machinery in there, does this sum of $253,066.80, in your opinion, constitute the fair and reasonable and the total fair and reasonable value of the use of this property over the term stated, including all restoration and renovating costs?

Mr. Hotz: Respondent objects to the question upon the grounds that the witness has not shown himself qualified to answer; therefore, incompetent; that he proposes to arrive at figures of valuation in a manner that is not permissible under the laws of evidence, by taking certain figures that were given to him by somebody else and depreciating them in his own way, and he has had no experience in the operation or handling (III, 776) of machinery or equipment and he purposes to be a real estate man largely and primarily; that he is incompetent to judge values of any of the items such as floors, repairs to the building, windows, elevators, terrazzo floors, and especially machinery and fixtures, and that, by his own statements on the stand, he has been shown incapable of judging.

The Court: Overruled. Now, insert the answer.

A. Yes."

• • •

The witness then gave his compilation in the form of government Exhibit 24 (III, 777). It was objected to upon the same grounds as his testimony, and the objection was overruled and the exhibit received by the court (III, 776). The exhibit showed total annual rental, including excessive use, $65,663.00, plus additional "restoration costs of $16,680," and showed a total of $253,066.80: "Rental" was arrived at by figuring a rate of interest, not on the cost to the Kimball Laundry Co. or its value in 1942, but on the witness's idea of values separately found by his own depreciation formula.

After the testimony of the witness Sholes, the government rested its case (III, 801).

The court ruled out the rebuttal testimony of all the petitioner's witnesses (except one), and in so doing committed the following errors:

XXIX.

Rebuttal testimony of Dahlquist re cost of $34,309.42 to repair petitioner's machinery and equipment.

The witness, Peter W. Dahlquist for the Kimball Laundry Co., qualified as an exceptionally reliable witness, having been in the laundry machinery and equipment business for many years as a buyer, seller, and in-

staller of it, and had purchased and sold and installed similar items throughout the United States (III, 803). The government witnesses, Newcom and LaTurner, were permitted, over counsel's objection (III, 556; supra 87-90) to testify that it would cost $11,668.73 to place the machinery and equipment in a good state of repair. The court finally ruled as follows in recognition of Dahlquist's rebuttal testimony (III, 811):

> "Q. In the event that repairs and replacements were put on these machines, either in the amount as I have (III, 812) related to you by the government's witnesses, or in the amount that you found, would it place that machinery and equipment in the condition that it was in 1942? In other words, would the restoration, by virtue of the repairs and maintenance and labor, place that machinery in the same condition that it was in November of 1942, after three and one-half years, of approximately three years and a little over of usage?
>
> Mr. Murphy: To which petitioner objects as incompetent and immaterial; not proper rebuttal testimony, being a part of respondent's case in chief; and for the further reason that there is no claim those repairs would put this machinery in the same condition it was in 1942, the government's figures adding over and above that, at least, normal depreciation to a considerable extent; and for the further reason that the witness is not shown qualified to answer and there is no proper foundation laid, it appearing from the testimony of this witness that his business does not involve appraisals of repairs, but his supervising of installation, only, of new and used machinery, and that the only appraisal he ever made was in connection with a fire loss; and for the further reason that there is no foundation laid in that there is no showing that this witness at any time made any appraisal of machinery other than Amer-

ican Laundry Machinery items. I thought that first part of the objection was ruled on Friday.

The Court: Not exactly. The Kimball Laundry offered evidence on the proposition of damage, the value between the time of taking and the present time. The government proceeded along this line and offered evidence of what would be required to repair these machines. Now, this is the first opportunity that the Kimball Laundry Company has had to go into that question. This man is going to testify that it cost more or less than the government's witnesses. That is proper rebuttal testimony, but he will not be permitted to go any farther than to show what his figures are. That is rebuttal testimony. He lays a foundation in that he is in (III, 813) the service or employ of this American Laundry Machinery Company and that he, in that capacity, made an appraisal of the items of repair that would be necessary, and arrived at his figure. He is competent to do that. He is selling these repairs. But, to undertake to appraise the building or matters with which he is not familiar, that will not be permitted. Have I made myself clear? We will follow that line and you will not go any farther." (Supra 64-67.)

(III, 815) "Q. From your experience in observing laundry machinery and equipment, such as you related Friday, has it been your experience, would you say, that when you saw this laundry machinery equipment in November of 1945, that it showed any evidence of abnormal use, or was it such as you would find in any laundry that had been running and operating for a period of three years?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained.

Q. Would the expenditure of the amount of money you said, $34,309.42, restore that machinery

and equipment in a condition of repair so that it would be virtually restored to a new condition, substantially so?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained."

The testimony of the government's witnesses was for $20,471.27 (III, 809-10), while Dahlquist's was for $34,309.42 for the same material and parts. The difference was in labor costs. Mr. Dahlquist estimated the labor cost at $2.85 per hour, whether skilled or unskilled. On redirect examination the question was asked (III, 822):

"Q. Does all the work which you saw that was necessary to be done down there require skilled work, or is it any of it common labor?

A. I will say it is. At that time you had to pay the prevailing rate whether he was carrying a bolt around, or working as an electrician or a first-class machinist.

Mr. Murphy: Just a moment. Move to strike the answer as not responsive.

The Court: Sustained."

The witness Dahlquist's Exhibits 48, 49, and 50 are itemized (III, 822-3) as to cost of labor, etc. (found in original record Vol. III, 1089-91), showing that the explanation of the cost of labor made up this difference; and the court ruled from the jury's consideration the witness Dahlquist's rebuttal of the LaTurner testimony (III, 552) wherein the hourly rate was stated to be 85¢ for helpers. That amount was used by the witness Crowder, as shown by government Exhibits 10, 11, and 12 (III, 557-67). It was error by the financial difference between

$34,399.42 (III, 823) and $20,471.27 (III, 645). By the foregoing ruling the court denied the petitioner the right to rebut.

XXX.

The Kimball Laundry Co.'s rebuttal evidence on cost of painting and decorating, was denied.

The court erred in rejecting the testimony of G. A. Steinheimer (III, 829-31). The witness qualified as a large volumned painting and decorating contractor (III, 823). The procedure by the petitioner was first approved by the court (III, 812). Later this procedure was erroneously denied. Exhibit 52 (III, 829), a written bid by the witness Steinheimer stated that it would cost $17,281 to do the painting and decorating work which the government witness Rorick (III, 478-90) said could be done for $5,997 (III, 824). The government witnesses said this work of rehabilitating the building could be done for $8,389 (III, 827), and this item appears on government Exhibit 17 (III, 636-40).

(III, 828) "Q. I will ask you to state whether or not you made a bid to the Kimball Laundry Company, as such, based upon the same figures that you had given to Mr. Rorick?

A. We gave them a copy of the letter to Mr. Rorick.

Q. You made the same to both?

A. Yes, it is just a carbon copy.

(III, 829) Mr. Hotz: Now, we ask that Exhibit No. 52, with that explanation—

The Court: That does not change the rule. You know that. That is not rebuttal testimony. You have

been over that field. You have to put an end to this case sometime."

Exhibit 52 of the petitioner was erroneously rejected, and it had been fully explained in writing by the witness Steinheimer. His clearly understood bid for the painting and decorating work was $17,281 (III, 829), instead of $8,389 (III, 827) which had been alleged by the government witnesses to be sufficient.

XXXI.

Denial of the testimony of Peter Kiewit for petitioner to rebut the government's "cost of restoration."

The petitioner's witness, Peter Kiewit, was denied the right to testify in rebuttal (III, 831-5). He was a highly qualified witness in the construction business for the government and others during many years. He was thoroughly familiar with the cost of construction and of material and labor cost at the time of trial in Omaha (III, 831). He had made personal inspections of the Kimball Laundry Co. building, with the idea in mind of stating in writing the cost to place the building in a proper state of repair. He had gone through the building three different times during the previous week before his testimony.

(III, 832) "Q. Did you furnish the Kimball Laundry Company with an estimate of what it would cost to place the building in a good state of repair as you observed the necessary things to be done?

A. We prepared a proposal based upon putting the building in first-class condition, yes, sir.

Q. And you have just been able to complete that very recently, isn't that true?

Mr. Murphy: Objected to as incompetent and immaterial, the witness having testified when he did it.

The Court: Sustained."

Kimball Laundry Exhibit 53 was offered in evidence (III, 833-5) showing the itemized cost so proposed by Mr. Kiewit to be $53,970.

(III, 833) "Mr. Hotz: We offer that in evidence, if Your Honor please.

Mr. Murphy: To which the Petitioner objects as incompetent and immaterial and not proper rebuttal testimony, the Respondents in their case in chief having presented evidence in detail on both the value of the building and cost of repairs to that building.

The Court: I think there was a little difference on the basis of your measurement of the loss or damage down there between the Government and the laundry. They proceeded on the theory of the value at the time of taking and you come then with special experts to prove what it would cost to restore the building and put it in a first-class condition, and on that theory this is the first opportunity they have had. They had rested their case before you disclosed your method and I am going to permit it."

The court then committed error by sustaining the objection and changing his ruling because of the fact that Harry A. Jacobberger and A. L. Jacobberger had given testimony of the difference in value of the building between the time of taking and the time of trial, estimating the difference to be $35,000. The court stated (III, 833):

"The Court: You went into the matter with Mr. A. L. Jacobberger definitely and distinctly. Objection will be sustained."

Harry A. Jacobberger had testified when on the witness stand that he had some bids in preparation for destroyed property and that he would try to get them in during the week. The witness's bid was one of them. The court erred in making the following ruling (III, 834):

(III, 834) "Mr. Hotz: I would like the Court Reporter to read the portion of Mr. Jacobberger's testimony there about getting his bids in.

The Court: I read it.

Mr. Hotz: He said he would try to get them in before the end of the week if he could.

(III, 835) The Court: I read it and I know what it is.

Mr. Hotz: In reference to Exhibit 53, it is likewise offered as having been identified by the witness Mr. Peter Kiewit, president of Peter Kiewit Sons, and offer it as a part of the examination of Mr. Harry Jacobberger, in support of his testimony in reference to the structural repairs on the building, and ask the court for permission to do that in furtherance of justice in this case.

The Court: You were cautioned just before you rested your case that that was the time to introduce your evidence. Overruled."

The following had taken place during the testimony of Harry A. Jacobberger:

(II, 404) "Q. Have you had occasion to make inquiry into the condition of the building at the present time, speaking of the building as such now, the structural condition, after the army has been in there during this period of time, so that you could testify what you believe it will cost to make the necessary structural repairs to that building to bring it back as near as possible in the condition it was in No-

vember, 1942, and I wish you would tell us about that and give us the items you have in mind. You will find nothing on that exhibit you have there. That has to do with something else. That is the machinery and equipment.'

A. During the past thirty days I have spent considerable time in and outside of the building to find out what it would require to restore that building in as good condition as it was the day of taking and I have been trying to get estimates ever since for the work that has to be done to the building, and I find estimates are constantly going up. The longer we seem to wait on this thing, the higher the rates come on these estimates. For instance, I received an estimate this morning on the painting of that building. It hasn't been painted since 1941. The estimate was $17,000."

(II, 406) "Q. How about steel window frames?

A. In some cases they will have to be replaced. In most instances all they have to do is scrape the rust off and then have to put some rustproof paint on them.

Q. Have you an estimate as to the value of that?

A. No.

Q. What is your estimate as to what it would cost?

A. I wouldn't want to say. I haven't any idea.

Q. Do you suppose you could make up your mind and get it for us before we conclude this week?

A. I have been trying for a week to get that."

XXXII.

The court's error in rejecting the rebuttal testimony re J. J. Hanighen Co. on boiler expense.

The court erred in ruling out the actual estimate of the J. J. Hanighen boiler company as not proper rebuttal (III, 846,7). Petitioner's Exhibit 55 showed Mr. Hanighen's estimate of the cost to be $21,678. This was erroneously ruled out from consideration of the jury. The court stated (III, 849):

> "* * * Mr. Jacobberger has told us frankly what in his judgment he thought the damage was. You were given every latitude to support his testimony. You rested. Now, in rebuttal, this is not rebuttal testimony. * * *"

This was error, because it was offered in rebuttal to the testimony of the government witness Crowder that the boilers could be repaired and put in good working condition for $5,817.50 (III, 639). Mr. A. L. Jacobberger testified that this power equipment was worth $62,928.08 in November, 1942, and $35,260.53 (II, 271), in 1946, that one boiler of 225 h. p. was damaged beyond use and destroyed, to the damage of $8,921.25 to the Kimball Laundry Co. (II, 271, 310-11; Ex. 23, II, 273).

The court erred in refusing the Hanighen Exhibit 55 (III, 847) in rebuttal, because it showed the real expense to install to be $21,678 instead of the sum stated by government witness Crowder, and concerning which there was no testimony by either Jacobberger.

> (III, 847) "A. This Exhibit 55, Kimball Laundry Exhibit, is a bid on a boiler which was in the Kimball Laundry Exhibit 2? In other words, it is a bid to replace the boiler that we contend had been damaged beyond use.
>
> Mr. Hotz: We offer in evidence the bid of Hanighen, the letter, Exhibit 55.

Mr. Murphy: Objected to as not proper rebuttal testimony, and being a part of their case in chief.

The Court: Sustained.

Mr. Hotz: We offer to prove by Exhibit 55, and to prove by this witness, to verify the items in Defendant's Exhibit 23.

Mr. Murphy: Same objection and for the further reason I know of no procedure for making an offer of proof on an exhibit.

The Court: I don't either, but I am learning something lately."

This Exhibit 55 was proper rebuttal. It was Error for the court to reject it (III, 847-8).

o

LAW POINT NO. I

A.

The federal constitutional provision is a restriction upon the legislative and executive branches of our government in reference to taking property for public use without payment of just compensation. It is solely the duty of the judicial branch to determine just compensation in all cases that come before it.

Boyd v. U. S. (1886), 116 U. S. 616, 635, 6 S. Ct. 524.

Davis v. George B. Newton Coal Co. (1925), 267 U. S. 292, 43 S. Ct. 305.

U. S. v. New River Collieries Co. (1923), 262 U. S. 341, 43 S. Ct. 565-7.

B.

When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of the taking.

Monongahela Nav. Co. v. U. S. (1893), 148 U. S. 312, 13 S. Ct. 622.

U. S. v. Powelson (1943), 319 U. S. 266, 63 S. Ct. 1047.

U. S. v. Brooklyn Union Gas Co., et al (2 Cir., 1948), 168 F. 2d 391.

C.

These routes are distinguished from the noncompensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence known to the condemnor to be a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken.

Brooks-Scanlon Corp. v. U. S. (1924), 265 U. S. 106, 44 S. Ct. 471.

National Brick Co. v. U. S. (Dist. Co., 1942), 131 F. 2d 30.

Olson v. U. S. (1934), 292 U. S. 246, 54 S. Ct. 708.

Spanenburger v. U. S., 308 U. S. 256, 60 S. Ct. 225.

D.

The refusal of the trial court to receive competent evidence offered to prove such values is reversible error.

Argument

1. The above point (IX, B, C, D) was presented by the petitioner to the courts below as the law applicable to this case. The Court of Appeals held:[1]

> "We cannot accept this proposition as the law. The government took exactly what it purported to take, namely, the temporary use and occupancy of the company's laundry."

2. The position taken by the petitioner in the trial court embodied all parts of the foregoing legal point. Evidence was offered to sustain the position, but was rejected. Whether the government took a temporary use or an absolute fee title, it was necessary, as viewed by petitioner, to arrive at the fair, reasonable market value of the composite laundry and dry cleaning establishment as a going concern as a basis for the measure of damages, on the date of taking. Such basis is the standard adopted by the judicial branch of the government as seen from the cases listed above under "B" and "C". Therefore, the rule adopted by the trial court rejecting this evidence of value was error.[2]

3. "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their

1. Vol. IV, 8.

2. Error XIII, supra, 64-7; Error III, supra, 25; Table, supra, 7; Error VII, supra, 47-52; Error V, supra, 25; Instruction—Error II, supra, 34-82; Error X, supra, 28; Exception to Instruction—Error 14, supra, 38; Error IV, supra, 44-5; Error III, supra, 41.

efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"[3]

4. The petition in condemnation as filed herein was by the trial court erroneously interpreted to mean that by the terms and conditions for the taking therein set forth by the executive branch of government curtailed and limited the application of just compensation as judicially defined in the cited cases. The ascertainment of just compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.[4]

5. It was an abuse of discretion in the case at bar when the trial court gave too much credence to the right of the executive branch of the government by confining the evidence for compensation as if the problem were based upon an ordinary landlord and tenant arrangement. While the petition in condemnation stated that the government desired the business carried on at the designated location,[5] the executive branch defined its plan of acquisition to a temporary use of the real estate, with all personal property located thereon and used in connection therewith. Through those words the government as the condemnor succeeded at the trial in keeping out all evidence of composite value for all purposes, because as held by the trial court such

3. *U. S. v. Powelson* (1943), 319 U. S. 266, 63 S. Ct. 1047; *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622.

4. *Davis v. George B. Newton Coal Co.* (1925), 267 U. S. 292, 45 S. Ct. 305, citing *U. S. v. New River Collieries Co.*, 262 U. S. 341-3-4, 43 S. Ct. 596-7; *Boyd v. U. S.* (1886), 116 U. S. 616, 635, 6 S. Ct. 524.

5. Vol. I, 2, 7; II, 17.

value would include trade routes established, and that such value would be "going concern" value on November 21, 1942. This narrow view of the courts below has been assigned as error as above set forth and fully indexed in the footnotes throughout.[5]

6. There can be no doubt that the court did rule out all evidence of the composite value of this property as $987,624.32,[6] and instructed the jury accordingly.[7] Nor can there be any doubt that the witness Judd's testimony on the value of the trade routes as $340,516.85 was ruled out and error assigned.[8] Likewise the competent evidence that it would cost $412,450.00 at the time of trial to re-establish those routes was rejected.[9] This rejection of trade route value injured the petitioner's claims before the jury in the amount of $294,791.01[10] by the denial of the additional compensation. The sum rejected is over and above the total judgment[11] of $297,776.03 finally awarded under the instructions of the trial court.[12]

7. The Court of Appeals cited to sustain its position, the Powelson case,[13] that going values and trade routes were immaterial in this "temporary use case." The Powelson case holds by analogy that the value of the trade routes, for example, was neither the frustration of an enterprise nor the destruction of future business as was in-

5. Supra, 34-108; 23-34. This Law Point I covers all assigned errors on rejection of valuation.
6. Supra, 7-11.
7. Error I a to k, supra, 34-38; 39-41; 41-45.
8. Supra, 8-10; Error XV, supra, 71-2; Error VI, supra, 26.
9. Supra, 8-10.
10. Supra, 12.
11. Vol. I, 101.
12. Vol. I, 159-162; requested, 162-165; exceptions, 165-167.
13. *U. S. ex rel. Tyler v. Powelson* (1943), 319 U. S. 293, 63 S. Ct. 1047.

volved in the Powelson case. Powelson claimed damages for a frustrated promotional plan to develop the water power sites which he had collected and which were taken by the Authority before developed as going concerns. The value of these business opportunities was denied him; they were too speculative, and properly so. Pay would have been granted by the judicial branch of our government had they been already established and if destroyed in the taking. "If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed as *Sears v. City of Akron* (246 U. S. 242; 38 S. Ct. 245) indicates. Then the United States would be acquiring a business, not simply frustrating a promotional scheme. * * * We hold only that profits attributable to the enterprise which respondent hoped to launch are inadmissible as evidence as the value of the lands which were taken."[13]

8. The trade routes in the case at bar were established and had a definite value which inhered in and were a part of the property taken. The plant was a counterpart of the routes and vice versa. They cannot be logically separated, one from the other, for any purpose of valuation for just compensation. The routes were valueless without the laundry machinery and equipment with which to service the trade route customers. The routes were already established. They had been built up over the previous years at a large expense to produce an annual income of $400,000. The rejection of the evidence to so prove was error as above shown. These errors are herein discussed as indicated in the footnotes above.[14]

14. Supra, 6, 8, 9; 24-108; 23-34.

9. The Monongahela case was reversed by this court because the just compensation awarded did not include the value of the income from the franchise to collect tolls. "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, —the franchise to take tolls."[13]

10. There should be no discrimination against a private right to operate business routes and the private right to take tolls in the matter of just compensation. No fair distinction can be made under the Constitution. No estoppel was pleaded or proven in the Monongahela case; however, as a defense to the Navigation company's claim of compensation for the loss of the tolls, the government set up that the Navigation company had no right in the first place to build its lock and dam across a navigable stream with no other consent than the State of Pennsylvania. The Navigation company answered that the government had encouraged the construction of the lock and dam in question and had appropriated and given to the Navigation company $25,000 to aid in its construction when built some years previously. The court held that under such condition the government could not successfully claim that the Monongahela Company had no right to place its lock and dam on the navigable stream. To that extent, estoppel may be inferred. Such estoppel fails to lessen the importance of the point in issue, i. e., that the income from the tolls proved productiveness, and productiveness increased the value of the whole property. In the case at bar the court rejected all the Hillmer exhibits which were the complete audit of the income and expendi-

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13. *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622.

its tracks safe from the ice, wind, saturation, silt, etc., which were the natural results of the dam erected by the government, the court permitted such recovery even though the recovery was resisted strongly on the basis that such damages were consequential rather than real or proximate. The court carefully distinguished the cases cited by the government[19] to substantiate its position that the appellee's damages were consequential. It divided the government's cases into two categories: first, those arising under the Tucker Act, wherein by reason of lack of jurisdiction and lack of actual taking, no consideration of just compensation could be given; and those which arose prior to a clearly apparent liberalization of the nature of what constitutes a taking of property for public use. The court pointed out that to the word "taking" there has now been added by judicial interpretation the words "or damaged." The Nebraska Constitution contains the word "damaged," as copied in the appendix. This modern trend where the word "damage" does not appear, as in the Federal Constitution, clearly comports with fairness and justice and without which just compensation guaranteed by the Constitution fails of accomplishment.[20]

2. Another specific instance which reflects the more liberal attitude of the court toward consequential damages, is found in the case wherein the government takes a temporary use of a warehouse, thereby requiring the tenant leaseholder to move and acquire additional warehouse space elsewhere. In accomplishing this, it was necessary for the tenant to incur a bonus expense of $12,000, plus

19. *Sanguinetti v. U. S.*, 264 U. S. 146, 44 S. Ct. 264; *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127; *Christmann v. U. S.*, 74 F. 2d 112.
20. *U. S. v. C. B. & Q. R. R. Co.*, 82 F. 2d 131, 141.

an "above normal moving cost" of $15,000. The government argued that these were consequential damages from the condemnation, for which there should be no recovery against the United States. However, the Court of Appeals, reversing the trial court, stated that although these items could not be considered independently, they should nevertheless be considered in arriving at the market value of the space under all conditions and circumstances of the taking.[21]

3. In a case cited the court was confronted with the question of determining whether the loss in the valuation of the property retained was a consequential damage. It was proven therein that an actual business loss was suffered by the condemnee. As a basis for the determination of this property loss, the value of the property before and the value after the taking was held proper. The court found that such loss was a compensable damage as distinguished from a noncompensable consequential loss. The court reasoned that it was common sense that a buyer would pay for property what it was worth to him and would purchase at a figure on which he could reasonably foresee making a profit on his investment. Viewing the facts in this practical light, the court found the damages sustained by the condemnee were actual and proximate and not merely business losses or losses of profit which of their very nature are consequential damages.[22] This reasoning and holding is applicable herein.

4. The government has in the past attempted to avoid the payment of damages for the acquisition of various rights of way, such as the right of egress and ingress.

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21. *U. S. v. Katz Drug Co.* (8 Cir., 7/31/45), 150 F. 2d 687.
22. *U. S. v. 257.65½ Acres of Land, etc.* (1947), 72 F. Supp. 903.

tures, both gross and net, of the company in various periods. This evidence showed gross income of $6,728,454.64 over the period from the incorporation of the company in 1924, with an annual income of $460,000 gross at the time of the taking. It was error for the court to have ruled out the Hillmer audits.[16] A buyer would most assuredly call for these very audits to determine fair market value.

11. When the Brooklyn Navy Yards were extended, the government took in some twenty-five acres of land upon which an electric power company operated to furnish these utilities to the population under its franchise arrangements with the municipality. The court, in addition to awarding proper compensation for the loss of equipment and the value of certain land, reversed the case and ordered an appraisal made of the value to the utilities company of the productivity of the electricity sold in the territory taken.[17]

12. In each of the four cases cited above under Point I-A to D, damages were awarded to the owners of the property for losses as the direct result or consequence of the taking, even though in each case the government failed to condemn or take that part, parcel, or element, the value of which was destroyed to the owner by the taking.[18]

13. The question presented to this court is whether or not in the case at bar the principles established in all

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16. Supra 5, 6, 7; Error assigned re rejection—Error V, supra 25; Error VII-VIIa, 47-52.

17. *U. S. v. Brooklyn Union Gas Co., et al.* (2 Cir., 1948), 168 F. 2d 391.

18. *Natl. Brick Co. v. U. S.* (Dist. C., 1942), 131 F. 2d 30; *Olson v. U. S.*, 292 U. S. 246, 54 S. Ct. 708; *Sponenbarger v. U. S.* (8 Cir., 1939), 308 U. S. 256, 60 S. Ct. 225; *Brooks-Scanlon Corp. v. U. S.* (1924), 265 U. S. 106, 44 S. Ct. 471.

the foregoing cases cited under Points Nos. I, A-B-C may be completely altered by a petition signed by the executive branch limiting its taking of the property in question to a temporary use. Petitioner admits the obvious: that the property was abandoned to the petitioner immediately after the trial in its dilapidated condition and with its trade routes completely destroyed. That property had a value to the petitioner even in such condition. Herein following petitioner will point out through adjudicated cases the proper basis for determining the damages for the term occupied, based upon cases of property taken for temporary use that have no fixed rental value, such as square foot, or acre, or other customary unit of measurement for rental purposes.

LAW POINT NO. II.

Ordinarily, "consequential damages" are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while "proximate damages" are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause.

U. S. v. C. B. & Q. R. R. Co., 82 F. 2d 131, 141. Cert. denied, 298 U. S. 689, 56 S. Ct. 957.

U. S. Katz Drug Co. (8 Cir., 1945), 150 F. 2d 687.

U. S. v. 257.854 Acres of Land, etc. (1947), 72 F. Supp. 903.

U. S. v. Welch (1910), 217 U. S. 333, 30 S. Ct. 527.

Argument

1. In a case wherein a railroad sought to recover damages for the amount it was forced to expend in making

which were lost to the condemnee by the taking, on the grounds that the damage resulting from the loss of such right was consequential and should be distinguished from direct or proximate damage. The courts, however, refused this erroneous premise advanced by the government, and held that such rights of way were, in effect, easements and that the acquisition of the same entitled the condemnee to just compensation for them. The courts went further in that they held that the granting of just compensation therefor could not be denied because the easement was destroyed and as a result there was no taking. The court held that since the destruction of the easement was for a public purpose, it constituted a taking and the condemnee was entitled to just compensation for his loss of the easement.[23] Such reasoning and holding is applicable herein.

5. The trial court, when it excluded all the petitioner's evidence relative to the cost of establishing the trade routes, did so on the theory that the loss of the routes was consequential damages.[24] The court, in rejecting this evidence, erred because by so doing, it failed to make the proper distinction between proximate damages, which are those which accrue directly and as a natural consequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause, and consequential damages which are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause.[25] There was nothing intervening that caused the losses to

23. *U. S. v. Welch* (1919), 217 U. S. 333, 30 S. Ct. 527.
24. Error I, supra, 34-8; Except. Error II, supra, 38-40; Inst. refused, Error III, supra, 41-4.
25. *U. S. v. C. B. & Q. R. R. Co.*, 82 F. 2nd 131, 141.

the petitioner. The government either took or destroyed the values in the taking of the business as operated by the petitioner.

6. Instead of excluding, by the instructions, all the petitioner's evidence as to destroyed values, by stating they were consequential damages, should not the court have received such evidence and instructed the jury to assist them in properly arriving at a sum which would be just compensation for the interest destroyed and which obviously were the values measured by the usual market price in the trade?[26] Such evidence was offered but denied because consequential. There is a clear distinction between evidence which affects the market value of the condemnee's property and that of consequential damages. The trial court failed to recognize the distinction.[27]

7. There is no doubt that the trade routes and this composite property, with its divers departments equipped to service all the needs of its route customers, enhanced the value of the petitioner's property. Should not the court have recognized these values and instructed the jury to consider them instead of denouncing all values destroyed as consequential, and required the jury by instruction to confine its deliberations to a small rate of interest on the investment in land, building, and machinery, each separately appraised, and exclude all else? The above-cited cases are petitioner's authority for predicating error upon the trial court's conception of consequential damages?[28]

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26. Witness Hillmer, Error VII, supra, 47-53; Error IX, 58; Error X, 60; Error XI, 60-2; Error XII, 62; Error XIII, 62-6; Judd on Route Values, Error XV, 71; costs to re-establish, Error XVI, 72.

27. *U. S. v. Katz Drug Co.* (8 Cir., 1945), 150 F. 2d 687.

28. *U. S. v. 257.65½ Acres of Land, etc.* (1947), 72 F. Supp. 903.

8. In the case at bar the court instructed the jury that "Under the Constitution and under the law, you cannot make any allowance whatever for property that is not taken."[29] The court also said, "I permitted evidence in this case as descriptive of the property, only, of the fact that it was a going concern. That is not the measure, whether it is a going concern or not, but is descriptive of the condition and will give you a picture, an idea of the property, the use of which was taken. That was one reason. The fact that the Kimball Laundry Company undertook to place some element of value on the property, since it is a going concern, is not permissible and is not competent. It is not the thing that we are appraising here or that we are holding the inquest on. The reason for this is that this is not a damage suit. It is not an action such as would be brought between individuals based on a tort where they would be entitled to recover anything they lost, good will, going concern, and damages and that sort of thing. That is not the kind of an action we have here. The only reason is that the law does not provide for these things."[30] No good will was ever offered in evidence at any time as an element of value.[31]

9. The court also said, "Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army."[32] The court said, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it when-

29. Vol. I, 154.
30. Vol. I, 155.
31. Error VI, supra 46; supra, 1015; Vol. II, 200.
32. Vol. I, 159.

ever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here."[32] Petitioner contends such interests on capitalized values is an improper measure of damages herein.

10. The exceptions were taken to the court's instructions, and requested instructions were tendered and refused. The composite instructions of the court, while containing some proper statements of the law, served only to confuse the jury and left them no other course than to accept the valuations of the witnesses, Weber and Sholes, with an interest rate figured separately on the value placed by these witnesses upon land, building, and machinery. Error has been predicated upon this procedure, these instructions, and the exclusion of the fair, reasonable use value that was offered by the witnesses as owners.[33]

LAW POINT NO. III.

In condemnation proceedings fair market value defines a basic figure. When the damages to be awarded are for an arbitrary interim period of use and occupancy, between the date of taking and the date of abandonment to the condemnee, the fair market value when returned subtracted from the fair market value when taken will result in just compensation.

11,000 Acres in Texas v. U. S. (1945), 152 F. 2d 566.

Olson v. U. S., 292 U. S. 246, 54 S. Ct. 704.

U. S. v. Land in Marin County, Calif. (1946), 65 F. Supp. 454.

U. S. v. Indian Creek Marble Co. (Tenn., 1941), 40 F. Supp. 811.

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33. Vol. I, 156; supra, Errors 34-108 and 23-34.

U. S. v. Lynah, 188 U. S. 445, 23 S. Ct. 349.

U. S. v. Bowman (Ore., 1943), 56 F Supp. 109.

U. S. v. Land in Charleston (S. C., 1943), 54 F. Supp. 478.

U. S. v. Hotel, Oakland, Calif. (Calif., 1943), 53 F. Supp. 767.

Second War Powers Act, March 27, 1942, "Acquisition and Disposition of Property," amending Title 50, Sec. 171, by Sec. 632, 636, 636(a), Title 50 U. S. C. Found in Appendix.

"Return of Property to Original Owners," 50. U. S. C. Sec. 722. Found in appendix.

Argument

1. The foregoing cases are damages for temporary use. They involve the measure of damages to be adopted. In most instances the difference in value before and after taking or value when returned, has governed. In some of the cases the United States District Courts have denounced the Land Department attorneys for the government for attempting to impose a temporary use on fee-owned property, as in the case at bar, when such attorneys well knew it would open the door to injustice arising from an attempt to fix "rent" under circumstances where rent never existed.[34] Some of the courts have refused to hold that right of temporary use on fee-owned property was authorized under the statutes above set forth. Others hold that the "temporary use thereof" which the government might take meant the condemnee's temporary use of the property.[35] In most of the cases above cited the point of the right to condemn a temporary use was not contest-

34. *U. S. v. Bowman* (Ore., 1943), 56 F. Supp. 109, 115.
35. *U. S. v. Hotel* (Calif., 1943), 53 F. Supp. 767.

ed. Only the measure of damages seemed important. The United States Supreme Court has held that the wording of the petition does not govern what was taken, but the result achieved must determine. As above shown under Point I, the judicial branch of government must insure just compensation by its action, regardless of what is taken, for how long, or for how much and irrespective of the wording of the petitions.[36]

2. In the case at bar petitioner submits that the taking was absolute and the result was exactly as if the fee were taken. It was a going and established servicing business that the army needed.[37] The army wished to operate it for pay from soldiers for the same services condemnee had long been giving to its route customers.[38]

3. However, the government did declare the laundry as surplus and abandoned it to the condemnee after 3.6 years of hard, and, no doubt, very profitable, use.[39] The government had two alternatives when the property was declared surplus. The first was to take the fee by ex parte court order, accomplished merely by filing a paper in the Clerk's office so declaring; then offer the property for sale and credit the army with the funds received against the award that would be paid petitioner for the full market value of the composite property at the time of taking. The other alternative was to turn back the property to the condemnee in its then condition, and have the values determined in the instant case based upon values at time of taking and values at the time of return.

36. *Davis v. Newton Coal Co.*, 267 U. S. 292, 45 S. Ct. 305.
37. Supra, 4-10.
38. Supra, 5. Vol. II, 447-8.
39. Vol. I, 97.

Either plan would have insured just compensation as defined by the courts. Instead, the government insisted upon a procedure that could not insure just compensation except by happenstance. This brief is replete with record references to the obvious confusion in trying to determine "rent" for taking over a going business with the likewise obvious impracticability of seeking the proper measure of damages under the circumstance presented.[40] No better proof of the confusion is found than in the repeated utterances of the trial court herein during the trial and in its instructions.[41] The points of error were saved by petitioner on its offers of proof on before and after value, the instructions requested by it for the same purpose, the exceptions made, the errors assigned and argued below, and now presented herein as grounds for reversal with directions to the court below to adopt the before and after value standard suggested by petitioner. The question is herein earnestly propounded. Its answer will aid in the administration of justice whenever the government takes over a going business for its own use. Any nationalization of industry must meet proper requirements of just compensation. The 5th amendment must not be defeated by shifting to "rent" for indefinite periods without compensation for the full value lost as a direct result of the taking of the business.

3. The duty imposed upon the district judges to define and instruct the measure of damages for so-called temporary use, is difficult of fulfillment, as seen in the opinions

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40. Supra, 23-34, 31-108.

41. Vol. I, 150-162; Error I, supra, 34; II, III, supra, 41-4; VI, supra, 47-53; IX, supra, 58; XI, supra, 60; XII, supra, 62; XIII, supra, 64-7; XIV, supra, 67-71; XV, supra, 71; XVI, supra, 72; XVII, supra, 74; XVIII, supra, 75-80; XIX, supra, 81; XX, 83; XXI, 84.

from the foregoing cases. The exception is where there has been a lease condemned for a "temporary use thereof," which lease defines the so-called "rent." Had the Kimball Laundry Company been "rented" in the course of business, it no doubt would sell the trade routes, machinery, and equipment outright, and rent the ground, building, and mechanical equipment to the purchaser. But no such thing ever existed of "renting" an income producing business. The business might be destroyed during any rent period.

4. The Jacobbergers, as owners of the capital stock of the petitioner, tried to meet the court's plan of fixing "rental value" for the period. Their testimony was temporarily admitted. The figures given them were between $570,000 and $600,000 for the 3.6 year term. From this sum the trade routes must be built back at an estimated expense of over $412,000 to be spent over three years; the loss on machinery was fixed at over $153,000; over $53,000 for structural repairs to building and $17,000 for painting and $35,000 must be paid for boiler replacement from the sum, and, in addition, taxes, insurance, and expense of storage. Since the sums given by the owners seemed fair, when explained by them they should have been submitted to the jury to deliberate upon. But these figures were not submitted either for the full amount or as broken down into what would be done with the money.[42]

5. However, should this High Court conclude that interest on fixed capital investment as awarded for the use at $70,000 per year, was proper, then most certainly in the face of actualities the excessive damages to restore

42. Supra, 15-16.

the property may now be known with exactness. The trade routes were destroyed; they had a value on November 21, 1942. If they still had value on March 23, 1946, when the property was returned, such fact may now likewise be measured with exactness. The testimony of Kiewit, Steinheimer, and Hanighen offered in rebuttal,[43] but refused, demonstrates the immense difference in the estimated costs to restore, between them and the inexperienced government witness Crowder. Now these matters may be judged *in praesenti* rather than *in futuro*.

The Fifth Amendment requires expression by the judicial branch in terms of exactness when possible. It was reversible error by the trial court to conduct the proceedings as it did.[44] It is timely now for the corrections to be made by reversal, with directions for the measurement of damages as herein suggested under this Law Point No. III.

LAW POINT NO. IV.

When payments for just compensation are delayed until trial and award by the jury, additional compensation is granted as a matter of statutory law. Upon the total amount ultimately found due in the jury's award, the law provides that six per cent on the amount, from the date of taking, less payments made, shall be included in the award. It constitutes error for the court to deny such additional compensation.

40 U. S. C., Sec. 258(a). Found in appendix.

U. S. v. Klamath & Moadoc Indians (1938), 304 U. S. 119, 123, 58 S. Ct. 799, 801, and cases therein cited.

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43. Supra, 11-13.
44. Supra, 34-108.

U. S. v. 6.87 Acres of Land (1945), 147 F. 2d 351.

U. S. v. Rogers (1921), 255 U. S. 163, 41 S. Ct. 281.

U. S. v. Seaboard Airline (1923), 261 U. S. 299, 43 S. Ct. 354.

Phelps v. U. S. (1927), 274 U. S. 341, 47 S. Ct. 611.

U. S. v. Northern Pacific R.R. Co. (Wash. 1943), 51 F. Supp. 749.

Argument

1. Interest is a nontaxable item against the United States, as a rule. The Fifth Amendment was not designed to remedy that situation in condemnation proceedings. But congress desired to add to the measure of damage in condemnation proceedings because of the delay in determining what just compensation should be finally paid. The law provides that money may be paid into court from time to time in a condemnation proceedings without regard to the ultimate award. When the ultimate award is found, then Congress provided that "said judgment shall include as part of the just compensation awarded interest at the rate of six per cent per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."[45]

2. The trial court sustained the government's request that interest be denied as provided in the forego-

45. 40 U. S. C., Sec. 258(a) (appendix this brief).

ing section of the statute, and based its request upon the fact that the "taking" should date only to the beginning of each government fiscal year during the 3.6 years instead of to Nov. 21, 1942, the date of taking possession. The petitioner was awarded $252,000 for the period of 3.6 years. From time to time money was paid into court under the statute without regard to whether it was or was not full compensation. On those amounts so paid, no additional compensation is had. Consequently, as viewed by the petitioner, the final award should have dated back to the date of the taking in accordance with the statute, and interest should have been awarded accordingly as additional compensation as provided by the statute.

3. This error was assigned[46] and presented to the court below. The trial court was sustained by the Court of Appeals.[47]

4. The method adopted by the trial court of figuring the interest is fully set forth in the judgment on the verdict,[48] and the petitioner's position thereon is fully set forth in its motion in arrest of judgment[49] and in the motion for new trial.[50] It need not be repeated.

5. It will be seen that no interest was allowed on the item of $45,776.03 found as pay for the extraordinary damages done to the building and equipment. Of course, the entire judgment less the payments into court drew interest from the date of the verdict on March 20, 1946, until paid. But that is not the point before this Court.

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46. Supra, Error XXII, 85-6; XXIII, 86.
47. Vol. IV, 13.
48. Vol. I, 103.
49. Vol. I, 97.
50. Vol. I, 107.

Is it legally possible for the executive branch of the government to defeat a statute in reference to condemnation by cutting the term of possession into bits by an ex parte filing of a new declaration of taking as if there was to be a hearing before a jury to determine the award upon each of such filings? Obviously that was not the intention of the government. The army took the property on November 21, 1942, and kept it and maintained it until it was declared surplus and abandoned on March 23, 1946. During that period of time there was no determination of the amount due the petitioner from the army for just compensation. The payments were haphazardly made into court as shown on the table presented in this brief[51] for credit on the ultimate award.

6. The petitioner's conception of the law is that the ultimate determination of the amount to be paid dates back to the date of possession as the starting point for the 6%. The statute provides that additional compensation shall be paid for that delay in the determination and payment of the amount due. The statute provides that payments into court draw no interest. "Taking" means to give up the possession before payment. It is that "taking" that the statute contemplates as the date to fix the beginning of the time to figure six per cent additional damages on the ultimate award.

7. As far as the judgment for excessive damage to the structure and the machinery is concerned, that too must be governed by the statute and date back to the day of taking. The item calls for no different treatment than the so-called rental. Inadvertently and haphazardly

51: Supra, 21.

the term "rental" has crept into this case and into some others in the lower courts. The entire award is actually for *damage* that is ultimately determined by the jury upon which the additional compensation applies. The statute fixes the date to start figuring the 6%, not the court.

8. There was filed, also, before the trial court an additional item of damage in reference to the costs and expenses that the petitioner incurred in complying with the mandate of the court to come forward and have its property appraised before the Board of Appraisers. In complying with the court's request, the petitioner expended the sum of $3,153.97.[52] These expenses have been itemized and explained fully. The trial court denied them, and the denial was affirmed.

9. It seems, as a matter of justice, that these expenditures, necessarily made for the use of the government as well as the condemnee in an effort to arrive at just compensation, should be awarded the condemnee as additional damages occasioned in the proceedings, even though perhaps not technically allowable as costs under the statute.

10. Another item of interest which was denied the petitioner was in reference to interest on $34,875.50 from November 21, 1942, to July 8, 1943, when the item was paid by the government to the petitioner. The item was for soap, chemicals, and similar items that the government needed in the operation of this laundry as a going concern. It took these supplies on November 21, 1942, and the petitioner received its pay on July 8, 1943. This interest aggregated $1,395.02. The application was set forth

52. Vol. I, 40, 45.

first in the petition in error,[53] then in the answer,[54] both of which were stricken,[55] and submitted to the court below which disapproved the item by stating, "we find no evidence in the record to support the assertion."[56] The court's attention was directed, as herein, to the presentation of the matter to the trial court, and the motion to strike it from the pleadings and the court's sustaining it. Consequently, there could be no evidence on the subject. It was error for the court to have stricken it, as well as the item in connection with the expenditures before the Board of Appraisers.

11. These matters of interest are of vital importance, especially in reference to the attempt of the government to avoid the additional statutory compensation by claiming that each government fiscal year constituted a new taking for that year instead of as above stated, the affixation of the six per cent from the date of the actual physical taking possession of the plant under the petition filed Nov. 21, 1942.[57]

12. The foregoing cases support petitioner's views.

LAW POINT NO. V.

Under the law announced in the Petty and General Motors Company cases, the petitioner's evidence herein of cost expended in establishing its trade routes, together with other evidence of their value, should have been admitted by the trial court because affecting market value of the interest taken by the government, as distinguished

53. Vol. I, 45.
54. Vol. I, 30.
55. Vol. I, 76; III, 863.
56. Vol. IV, 14.
57. Vol. I, 1, 5, 12.

from such noncompensable items as proof of value peculiar to the petitioner, the value of good will, the injury to the business of petitioner, or other consequential damages.

U. S. v. Petty Motor Co. (1946), 327 U. S. 372, 66 S. Ct. 596.

U. S. v. General Motors Corp. (1945), 323 U. S. 373, 65 S. Ct. 357.

Argument

1. The crux of the controversy between the petitioner and the government is whether the trade routes constitute such an integral and essential part of the business that the fair market value of the laundry taken by the government would remain undetermined unless evidence of costs to establish these routes and other evidence of their value were admitted.

2. The government, seeking to substantiate its position, prevailed upon the trial court to hold that the petitioner's loss of its routes was a consequential damage, and the court announced it relied upon the Petty and General Motors Company cases for such ruling.

3. When this High Court stated in the General Motors case at page 383 that "proof of value peculiar to the respondent, or the value of good will, or of injury to the business of the respondent. * * * in this case (the case of the taking of a temporary use and occupancy), as in the case of the condemnation of a fee, must be excluded from the reckoning," the court in the case at bar considered the statement as authority for classifying the loss of the trade routes as consequential damage. The trial court herein failed to recognize the clear-cut dis-

tinction made by the High Court in these cases between evidence of consequential damages and evidence which affects market value.

4. In the General Motors case the government also took the view that such items as labor, materials, transportation, storage, and costs necessary for the occupation of other leased premises were consequential and were of course noncompensable; this Court rejected the government's contention and held that the lower court should have received this evidence, on the grounds that these items properly affected market value, ruling that such items may be proved not as independent items of damage, but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease.

5. Either the trial court in the case at bar failed to recognize the distinction drawn by this Court between evidence of consequential damage and evidence affecting market value, or, having recognized the distinction, failed to apply it in the case at bar. In either event, these authorities which support petitioner's contention of the admissibility of its evidence of the market value of the property taken, were applied by the trial court to deprive petitioner of its substantial right to receive just compensation for the property taken. The record shows that the court on several occasions stated that its rulings were founded on the principle announced in the Petty and General Motors Company cases.[58]

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58. Vol. II, 231-2; Error XVI, Supra, 31; Error VIII, supra, 53-4.

6. The Petty Motor Company case supports the General Motors case with the exception that evidence of the cost of return to location would not be admitted as a factor for determining market value, since the lease of the condemnee expired before the expiration of the term taken by the government.

7. In drawing the distinction between consequential damages and incidents of valuation this Court recognized the reasonableness of including the items in question in the two motor company cases since they affected the market value of the interest taken. So the reasonableness of including evidence of the trade route valuation in the case at bar is apparently based upon the principles announced in said motor cases. There is no doubt that the first inquiry of a willing buyer of this laundry would be the extent and valuation of the trade routes which are the fundamental factors of valuation.

LAW POINT NO. VI.

The condemnee in condemnation proceedings is entitled to have the jury pass upon the evidence without having its effect or importance altered, as to either credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, or by improper instruction, if such comments or instructions tend to either magnify or diminish them in the jury's estimation. If it appears from the whole record that there has been an abuse of the trial court's discretion, it is the duty of the reviewing court to reverse the case and direct a new trial.

National Brick Co. v. U. S. (Dist. Col., 1942), 131 F. 2d 30.

Cal-Bay Corp. v. U. S. (9 Cir., 1948), 169 F. 2d 15.

Virginia Railroad Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400.

Langdon v. Loup River (1944), Neb. 625, 13 N. W. 2d 168.

McClellan v. Hein (1898), 56 Neb. 600, 77 N. W. 120.

U. S. v. Breitling, 61 U. S. 252, 20 How. 252.

Fleming v. Husted (8 Cir., 1947), 164 F. 2d 65.

Argument

1. In the National Brick, Cal-Bay Corporation, Virginia Railroad, and Langdon cases, the trial court was reversed in each case because of improvident remarks made in the presence of the jury by the trial judge. In the Nebraska case the court used the language embodied in the law point above set forth. In the National Brick Co. case the court said, "We think sufficient harm has been done by the rejection of proper evidence of value, coupled with the judge's statement limiting the appraisal to the value as real estate, to leave the jury bewildered as to the proper elements to be taken into consideration in ascertaining the fair market value of the property." The other cases are of similar holding.

2. When the witness, A. L. Jacobberger, was asked whether or not at the time of trial the laundry was in shape to be operated, the court, sustaining the objection, remarked, "I can go down and operate one by myself, and I don't know anything about a laundry."[59] The evidence showed that the commanding officer of the army in charge, Major General Craig, had issued an order to close the laundry as dangerous to human life because of

[59] Vol. II, 297-8.

the unsafe condition of the boilers.[60] In the instructions to the jury the court destroyed the evidence of the owners of the laundry after they had attempted to comply with the court's order in giving their idea of the amount of money that they should receive for a period of 3.6 years for the use of their laundry.[61]

3. In the McClellan case above cited, the court held it was an abuse of discretion of the trial court to deny rebuttal testimony even though it properly belonged in the main case. To refuse rebuttal testimony of a material nature seems to petitioner to be an abuse of discretion, especially when that rebuttal testimony in the most part was, as a matter of fact, proper rebuttal. Hereinabove it was shown that the evidence of the witnesses, Kiewit, Steinheimer, and Hanighen, had they been permitted to testify, would have given to the jury for its deliberation, $133,421.42 as the estimate of costs to repair damage to building, painting, boilers, and the machinery and equipment, as excessive damages. This testimony would have offset the government witness Crowder in his hearsay testimony of $59,743.01 for the same work. This rejection of rebuttal testimony, petitioner claims, was an abuse of discretion on the part of the trial judge.[62]

4. By reading the statement of the case and the proceedings below,[63] the errors assigned for reversal,[64] and the points relied upon for reversal which give the evidence and the remarks of the court in ruling on the ob-

60. Supra, 11, note 17.
61. Vol. I, 156; supra, 15-16, footnotes 28-23.4.
62. Supra, 19-20-24; 11, footnotes 18, 19, 20.
63. Supra, 4.
64. Supra, 25, 23.

jections,[65] the general attitude of the trial court will be apparent. The court was evidently determined to disregard every witness except those of the government and to confine the evidence that went to the jury to a capitalization on the investment in land, investment in building, and investment in machinery, not as shown by the cost or value to the petitioner but as separately appraised by the government witnesses. This the petitioner believes an abuse of discretion.

5. In the Breitling case the law is announced that it may constitute reversible error "when an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court, and if there is no evidence which they have a right to consider, then the judge does not aid them in coming to a correct conclusion by his tendency to embarrass and mislead them."

6. Similar expression is found in the Fleming case.

7. The trial court in the case at bar instructed the jury on a number of matters that were not in evidence and which seem to petitioner to be highly prejudicial to its cause. The court stated, "You are not to consider the fact that the owners of this property have a sentimental value there, having spent a lifetime working to build up the institution, and they did not want to sell."[66] Again the court said, "You cannot take into consideration the fact that these brothers and their families did not want to sell their property or did not want to lease it."[67] Again,

65. Supra, Errors 34-108.
66. Vol. I, 154.
67. Vol. I, 154.

"With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure."[68] The court had before it the best of testimony, as to both the value at the time of taking and the value when returned, and also had before it the testimony of the Jacobbergers which the court received and then struck out in the instructions as to the use value. This seemed to be an abuse of discretion. The court also said that the jury should make their award "without any sentimental values, without any good will, or the fact that it was a going concern or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army."[69]

8. No evidence was offered by the Jacobbergers of sentimental value, good will, or that they were put to a lot of consequential damages or a hardship or that they did not wish to sell.

9. The composite instructions of the court could only confuse the jury rather than enlighten it. In view of the foregoing authorities, it would seem that the action of the trial court in giving these instructions in the manner in which it did, constituted reversible error because it was a distinct abuse of the court's discretion.[70]

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68. Vol. I, 157.
69. Vol. I, 159.
70. Vol. I, 159-160.

CONCLUSION

1. Petitioner requests this court to reverse and remand the case, with such direction as will insure just compensation for the property taken or destroyed by the taking. Evidence of the fair market value of the Kimball Laundry as a going concern with all its trade routes as it existed on November 21, 1942, the date of taking, should be determined. From said sum so found should be deducted the fair market value of the whole property as it existed on March 23, 1946, when abandoned to petitioner after being declared surplus by the army. There should be added to that sum so found, six per cent from the date of taking until paid, less the sums paid into court by the government for the petitioner, in accordance with 40 U. S. C. 258(a).

2. The interest on the supplies item, and the expense chargeable to the appraisal, should be paid as additional damages in accordance with the request of the petitioner.

3. Should the court conclude that an award to petitioner should be made by the trial court adopting a plan other than above suggested, which would give adequate and just compensation for the elements of petitioner's assets, as they were on November 21, 1942, but destroyed, or damaged, or rendered incapable of return on March 23, 1946, as a result of the taking, then petitioner requests that such plan be expressed by this Court in its opinion of reversal with direction.

Dated November 22, 1948.

Respectfully submitted,

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APPENDIX

1

Chapter 11—Acquisition of and Expenditures on Land for National-Defense Purposes

(Title 50, U. S. C., Section 171, p. 121.) **Methods of acquiring title; condemnation, purchase, and donation; emergency provisions.** The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and

the lands may be occupied and used for military purposes, and the provision of section 175 of this title, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency. (July 2, 1917, c. 35, 40 Stat. 241; Apr. 11, 1918, c. 51, 40 Stat. 518.)"

(Sec. 171(a), Title 50 U. S. C., 1937 P. Pt., p. 55)

"Sec. 171a. **Same**; real property for war purposes.

"The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) (Title 40, Sec. 257, 258), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise in accordance with section 1(b) of the Act of July 2, 1940 (54 Stat. 712) (section 1171(b) of Appendix to this title). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of this title), notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the pur-

poses of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended (Title 33, Sec. 733; Title 34, Sec. 520; Title 40, Sec. 255; Title 50, Sec. 175). July 2, 1917, c. 35, Sec. 2, as added Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title II, Sec. 201, 56 Stat. 177."

Title II—Acquisition and Disposition of Property (Second War Powers Act, 1942); (Title 50 U. S. C. App., p. 255)

App. Sec. 632. **Real property for war purposes.**

"The Act of July 2, 1917 (40 Stat. 241) (Title 50, Sec. 171), entitled 'An Act to authorize condemnation proceedings of lands for military purposes,' as amended, is hereby amended by adding at the end thereof the following section:

"'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) (Title 40, Secs. 257, 258), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712) (Title 41, note preceding section 1). Upon or after the filing of the condemnation petition, immediate possession may be taken

and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended (Title 33, Sec. 733; Title 34, Sec. 520; Title 40, Sec. 255; Title 50, Sec. 175). Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title II, Sec. 201, 56 Stat. 177."

(Title 40-42 U. S. C., Sec. 257, p. 93 of Title 40)

"Sec. 257. **Condemnation of sites; jurisdiction.** In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice. (Aug. 1, 1888, c. 728, Sec. 1, 25 Stat. 351; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

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(Title 40 U. S. C., p. 123, Sec. 258)

"Sec. 258. **Same; procedure.** The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding. (Aug. 1, 1888, c. 728, Sec. 2, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

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(40-42 U. S. C., Sec. 258(a) pp. 139-40)

Condemnation of realty for sites and other uses; lands, easements of rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of the payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. (Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421.)"

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Title IV—Time Limit and Short Title (First War Powers Act, 1941); (Title 50 U. S. C., Sec. 621, App., p. 252)

"Sec. 621. Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate. Dec. 18, 1941, c. 593, Title IV, Sec. 401; 55 Stat. 841.

"Limitation on Act, see section 775 of this Appendix."

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(Title 50 U. S. C., App. p. 295)

"Sec. 775. **Effect on First and Second War Powers Acts.**

"Except as provided in section 8 of this Act (section 768 of this Appendix), nothing in this Act shall be effective to limit or affect any power or authority granted or conferred by the First War Powers Act, 1941 (sections 601-622 of this Appendix), or the Second War Powers Act, 1942 (sections 631-645a of this Appendix). June 5, 1942, c. 340, Sec. 15, 56 Stat. 317."

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(Title 50 U. S. C., App., p. 296)

"Sec. 776. **Termination of Act.**

"The provisions of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate. June 5, 1942, c. 340, Sec. 16, 56 Stat. 317."

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Act Oct. 16, 1941, C. 445, 55 Stat. 742; Public Law 274, 77th Congress; National Defense; President to Requisition Property; Title 50 U. S. C., App.

"Sec. 721. **Requisition of military materials for United States; compensation.**

"Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount

of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act (section 722 of this Appendix), but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24(20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41(20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722 of this Appendix), regardless of the amount in controversy in any such proceeding.

"Nothing contained in this Act shall be construed—

"(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

"(2) to impair or infringe in any manner the right of any individual to keep and bear arms, or

"(3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and

which is necessary to the operation of such factory or business.

"Sec. 2. Wherever the President determines that property acquired under this Act and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and prays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1943.

"Sec. 3. The President from time to time, but not less frequently than once every six months, shall transmit to the Congress a report of operations under this Act.

"Sec. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint.

"Approved, October 16, 1941."

(U. S. Code Congressional Service entitled "Historical Background of Government's Power to Requisition Property and the Need for the Present Bill," cf. Congressional Comment, Acts of 77th Congress, page 799.)

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SECOND WAR POWERS ACT, 1942

Title VI—Power to Requisition

(Title 50 U. S. C., App., p. 263)

"Sec. 636. **Amendment of Section 721 of this Appendix.**

"The last paragraph of section 1 of the Act of October 16, 1941 (55 Stat. 742) (section 721 of this Appendix), entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States,' is amended by deleting subdivision (3) thereof, so that the paragraph will read as follows:

"'Nothing contained in this Act (section 721 et seq. of this Appendix) shall be construed—

"'(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

"'(2) to impair or infringe in any manner the right of any individual to keep and bear arms.' Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title VI, Sec. 601, 56 Stat. 181."

"Sec. 636a. **Same; further amendment.**

"The second sentence of the first paragraph of section 1 of the Act of October 16, 1941 (55 Stat. 742) (section 721 of this Appendix), entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States,' is amended by striking out the words 'on the basis of the fair market value of the property at' and inserting in lieu thereof the words 'as of;' and at the end of such sentence, before the period, inserting the words, 'in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States,' so that such sentence will read as follows: 'The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken

over pursuant to this Act (section 721 et seq. of this Appendix) and the fair value of any property returned under section 2 of this Act (section 722 of this Appendix), but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.' Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title VI, Sec. 602, 56 Stat. 181."

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13

AMENDMENT

Act Oct. 16, 1941, C. 445, 55 Stat. 742 * * * (59 Stat. 271); Title 50 U. S. C., App., P. Pt. 1946, p. 92

"Sec. 722. **Return of property to original owner.**

"Whenever the President determines that property acquired under this Act (sections 721-724 of this Appendix) and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1946. As amended June 30, 1945, c. 208, Sec. 2, 59 Stat. 271."

o

14

AMENDMENT

Title 50 U. S. C., Sec. 721, App. P. Pt. 1947, pp. 89-90. (June 30, 1945, c. 208, Sec. 1, 59 Stat. 271) on the question of limitation of the United States District Court on the amount in controversy states:

" * * * Such courts shall also have power to determine in an appropriate proceeding any questions that may

arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722 of this appendix), regardless of the amount in controversy in any such proceeding."

15

FEDERAL CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Federal Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

16

Constitution of the State of Nebraska, Article I, Sec. 21; Vol. II, R. S. N. 1943.

"**Private Property Compensated for.** The property of no person shall be taken or damaged for public use without just compensation therefor."

17

Ch. 83, Art. 6, Vol. IV, p. 1710, R. S. Nebraska, 1943— "Eminent Domain by the State."

"Sec. 83-601—State; lands necessary for state use; right of eminent domain.

"Sec. 83-602—Plat; abstract; filing; certificate; appraisers; appointment; qualifications; notice; railroad land.

"Sec. 83-603—Appraisers; meeting; notice; report of assessment.

"Sec. 83-604—Warrants; deposit with clerk; certified copy of award; recording; right of possession.

"Sec. 83-605—Appeal from award of appraisers; procedure.

"Sec. 83-606—Nonresidents; notice of appeal by publication; how given.

"Sec. 83-607—Appraisers; compensation; return; payment.

"Sec. 83-605, Nebraska Statutes. **Appeal from award of appraisers; procedure.** Either party may, within thirty days after the filing of the award, appeal therefrom to the district court of the county where the lands lie. * * * The appeal shall be set for hearing at the next term of court, and shall be heard and determined in the same manner as appeals from awards in condemnations of lands for railroad rights-of-way.

Ch. 74, Art 3, Eminent Domain—Railroads, R. S. Nebraska, 1943.

"Sec. 74-313. **Right of way; condemnation; record on appeal.** The appellant shall, within the sixty days allowed for such appeal, procure and file in the office of the clerk of the district court a certified transcript of all the proceedings of such assessment, including also all

papers and files relating to or connected with the assessment appealed from, and the county judge shall upon demand make such certified transcript and deliver the same to the appellant."

20

"Sec. 34-314, **Nebraska Statutes. Right of way; condemnation; appeal; procedure.**

" • • • The parties shall proceed in all respects in the trial of the cause in the same manner as though the action had been originally instituted in such appellate court." (The appellate courts are the district courts of Nebraska.)

21

Ch. 25, R. S. Nebraska, 1943, Vol. II, page 233.

NOTE: Secs. 25-801 to 25-845 of the Nebraska Statutes provide that in proceedings in the courts of Nebraska the causes of action and defenses interposed shall be in writing and formulate the issues upon which the parties may rely in the trial of the causes.

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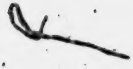

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 3-14, vol. IV) is reported in 166 F. 2d 856.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1948 (R. 15, vol. IV). The petition for a writ of certiorari was filed May 28, 1948. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the measure of compensation for the taking by the United States of the temporary use and occupancy of a laundry plant is the market value of the use and occupancy taken plus any destruction, damage and depreciation in the value of the building, machinery and equipment occasioned by the taking and in rejecting petitioner's claim either (1) for the full market value of the laundry, *i.e.*, of all the physical assets and the business, including the value of its trade routes and customers or (2) for the value of its trade routes and customers as an element of rental or use value of the laundry.

2. Whether, in a proceeding by the United States to condemn the use and occupancy of property for a specified period, extendible for additional yearly periods at the election of the United States, the courts below properly computed interest on the sum awarded for the initial period and each additional yearly period from the beginning of each period to the date of payment and on the award for damages occasioned by the taking from the date of the verdict until paid.

STATEMENT

In order to provide laundry and dry cleaning services for members of its armed forces, the

United States filed a petition on November 21, 1942, under authority of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V, sec. 171a, to condemn the right to use and occupy certain property in Omaha, Nebraska. The property, known as the Kimball Laundry, and owned and operated by the Kimball Laundry Company, consisted of real estate, together with all improvements thereon and all personal property used in connection with the laundry (R. 1-5). The estate sought in the petition was the right to use and occupy the property for a period ending June 30, 1943, and for additional yearly periods for the duration of the national emergency at the election of the Secretary of War (R. 2). The district court granted the United States immediate possession of the property and, with A. L. Jacobberger (secretary and operations manager of the Kimball Laundry Company) as superintendent, the plant was operated as a military laundry (R. 5-8, 265-267). The term taken was extended for additional yearly periods, the last extension terminating on June 30, 1946 (R. 12-16, 65-67, 82-85). From time to time, the United States filed declarations of taking and deposited estimated compensation in court for the various periods taken (R. 16-18, 55-56, 67-68, 85-86).[1] The Kimball Laundry Company with-

[1] On May 11, 1943, the term was extended to June 30, 1944 (R. 12). On June 19, 1943, the United States deposited $30,140 as estimated compensation for the term ending June 30, 1943

drew the sums thus deposited without prejudice to its contentions in the case (R. 52-54, 58-59, 71-72, 88-90). On November 19, 1943, six appraisers appointed in accordance with Nebraska law to determine just compensation for the taking, made their report fixing compensation in the sum of $74,940.00 per year (R. 36-38). Both the United States and the Kimball Laundry Company appealed from the appraisers' award (R. 39-40). A jury trial to determine just compensation for the taking was not had until March, 1946, and on March 23, 1946, three days after the jury returned its verdict, possession of the property was returned to the Kimball Laundry Company (R. 183, 95, 97).

In the district court, the Kimball Laundry Company contended that the United States, while ostensibly taking only the right to use and occupy the property, had in legal effect, taken all of the company's physical assets and its business as well, including its trade routes and customers, and was obligated to pay the full market value of what was alleged to have been taken, estimated to be approximately $1,000,000 (R. 21-31, 45-49, 91-93; vol. IV, p. 5). The company also contended that

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(R. 16-18). On April 6, 1944, $50,000 as estimated compensation was deposited for the term ending June 30, 1944 (R. 55-56). On May 31, 1944, the term was extended to June 30, 1945, and $50,000 as estimated compensation to cover that term was deposited on August 10, 1944 (R. 65, 67-68). On May 28, 1945, the term was extended to June 30, 1946, and $65,000 as estimated compensation for that period was deposited on August 8, 1945 (R. 83, 85-86).

if the rental or use value of its laundry was to be used to measure compensation, the value of its trade routes and customers was admissible as an element of value (R. 93-94; vol. IV, p. 5). The Government contended that just compensation was to be measured by the market rental or use value of the laundry for the period taken plus the cost of restoring the plant and machinery to the condition in which they were on November 22, 1942, the date the United States took possession of the property (see R. 169-170; vol. IV, p. 5). The district court was in accord with the Government's theory as to the proper basis for determining compensation and its rulings and instructions to the jury were in substantial conformity with that theory (see R. 150-165, 231-232, 244; vol. IV, p. 5).

The proceedings before the jury may be summarized as follows: A. L. Jacobberger, Harry Jacobberger and Fred Jacobberger, the officers and principal stockholders of the Kimball Laundry Company (R. 265, 384, 443-444), testified that in their opinions the total value of the use of the laundry for three years and seven months (November 22, 1942, to June 30, 1946), including damages to the building, machinery and equipment, was $570,000 to $580,000 (R. 318, 425, 433). Among other evidence admitted on behalf of the Laundry Company was the fee value of the land (R. 314, 389), the original and the reproduction cost of the building (D. Ex. 19, R. 261-264), the cost of putting

the building back in the same condition as in 1942 (R. 304-306, see D. Exs. 41, 42, R. 408, 412-415, 419) and the difference between the value of machinery and equipment in November 1942 and in March, 1946 (D. Exs. 21 and 23, R. 247-251, 253-254, 258-260, 270-273; see also D. Exs. 43 and 44, R. 408-412, 415-419, 420). For the purpose of showing the capacity of the laundry plant, that it was a going concern and the volume of business, the Laundry Company was permitted to show its yearly receipts (*i.e.*, gross income) from 1936 through 1942 (D. Ex. 10, R. 229-235; D. Ex. 12, R. 238-242); the amount of laundry work done each year from 1932 through 1941, measured (according to type) by the number of pieces, pounds or bundles handled (D. Ex. 24, R. 279-284), the total number of customers being served on November 21, 1942 (D. Ex. 11, R. 235-237) and the prices being charged for laundry and dry cleaning services under O.P.A. ceilings in November 1942 (D. Exs. 28 and 29, R. 295-297). The trial court refused to allow the company to show the value of the "Kimball Laundry Company" (*i.e.*, the fee value of all the physical assets and the trade routes) before and after the taking (R. 315-316) or to show the value of the trade routes as a separate item (D. Ex. 14, R. 368-370).

Two witnesses on behalf of the United States testified that the fair rental or "use value" of the property for three years, seven months, including damages to the building, machinery and equipment,

was $253,066.80 and $257,000, respectively (R. 775-776; Gov't Ex. 24, R. 777-778; R. 733-735; Gov't Ex. 22, R. 735-737). Other evidence on behalf of the Government included estimates of the cost of repairing the building, machinery and equipment so that the plant would be in a good and efficient operating condition (R. 478-483, 491-496, 507-510, 520, 531, 544, 548-567, 571-572, 601-608, 611-620, 631-645, 690-692).

At the close of the trial, the district court instructed the jury generally as to the meaning of just compensation, *i.e.*, that it meant that the owner should recover the full and perfect equivalent in money of the property taken and that the owner was to be put in as good a position pecuniarily as if his property had not been taken, and that the measure of just compensation is the fair market value of the property at the time of the taking. The court then pointed out that while the standard of fair market value works very nicely in cases of fee takings, it is much more difficult to apply it in cases of temporary takings because, as a general rule, as in the instant case, there is no market for the property for a temporary use (R. 150-153; see also R. 154, 162, 164). As the court stated, "There is no evidence of any laundry having been sold on the market. That being so, you have to begin to look around to find another yardstick" (R. 153). Continuing, the court commented on various items of evidence admitted for the purpose of

showing the fair rental value or value of the use of the property for the period taken and the principles applicable in arriving not only at that value but also in arriving at the amount of depreciation (R. 154-161). The court further instructed the jury that since it had appeared on cross-examination that some of the owner's witnesses had considered certain elements which were not proper, the testimony of those witnesses, insofar as the improper elements were concerned, should be disregarded (R. 156-157, see also R. 167). Finally, the court instructed the jury to bring in a general verdict fixing a lump sum covering both the value of the use of the property and the damages to the property and to make special findings (1) as to the amount allowed as "annual rental or the amount that you determine for the use of the property per annum" and (2) as to the compensation payable for failure to return the property in the condition it was on November 22, 1942 (R. 161). Appellant made various objections to the instructions, particularly because of its refusal to permit consequential damages to be recovered and to recognize as an element of damage the destruction of the trade routes and customer lists (R. 165-166).

The jury returned its verdict on March 20, 1946, awarding a total sum of $297,776.03 for the taking of the property for a term beginning November 22, 1942 and ending June 30, 1946, including compensation for failure to return the property in the

condition it was in on November 22, 1942 (R. 95-96). Special findings were made fixing the annual compensation payable at $70,000, making the total rental for the entire period of 3.6 years the sum of $252,000 and fixing the amount payable for failure to return the property in the same condition as when taken in the sum of $45,776.03 (R. 96). On April 9, 1946, the court entered judgment on the verdict, allowing interest at 6% (1) on the amount adjudged due for the use of the laundry for the period November 22, 1942, to June 30, 1943, from the beginning of the period until paid and (2) on the amount due for each year thereafter from the beginning of that year until paid, giving credit to the United States for the sums deposited as estimated compensation (R. 101-107). Interest was also allowed on the sum of $45,776.03, the award for failure to return the property in the same condition as when taken, from March 20, 1946, until paid (R. 105).

As stated above, the United States returned the laundry to the company on March 23, 1946, and on June 11, 1946, it paid into court $98,124.27, the amount remaining due to satisfy the judgment (see R. 95, 97, 138).[2] The company was permitted

[2] This sum included compensation for the use or rental of the property to June 30, 1946, no deduction being made for the fact that the laundry was returned some three months prior to that date. By stipulation it was agreed that $200 would cover all damages to the property occurring between March 20, 1946, the date of the verdict, and the date of surrender of possession (R. 134-136). Judgment was entered on the stipulation fixing

to withdraw $75,000 of the latter sum without prejudice to its right of appeal (R. 137-140).

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the judgment was affirmed, the court holding that the United States had not taken the Laundry Company's business, trade routes or customers, that while the Government's occupation of the plant undoubtedly disrupted and damaged the company's business such damage is not compensable under the Fifth Amendment (vol. IV, pp. 8-10). Pointing out that, even if the taking of the temporary occupancy of the laundry were to be given the legal effect of the taking of fee title, damage to the company's business would not be compensable, the court held that what was taken in the instant case was the temporary use and occupancy of the laundry, that just compensation for the right to use and occupy property temporarily is the value on the market of the use and occupancy, together with compensation for any destruction, damage and depreciation in value of the property occasioned by the temporary use and does not include business losses (vol. IV, pp. 8-10). The court below also held that interest on the award had been properly computed (vol. IV, pp. 13-14).

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the compensation for the damage agreed upon and also providing for a credit to the United States of $18,089.55 for certain personal property owned by it which the Laundry Company had agreed to purchase at that price (R. 136-137).

ARGUMENT

1. It has been settled by this Court that injuries to a business, like other consequential losses resulting from the taking of private property for public use, are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Company*, 327 U. S. 372, 377-378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379-380, 383; *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 281-282; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 675-676; *Bothwell* v. *United States*, 254 U. S. 231. The rule is the same whether the interest taken in the property is the fee title or a temporary use and occupancy. *United States* v. *Petty Motor Company, supra*; *United States* v. *General Motors Corp., supra*. As this Court held in the *General Motors* case at p. 383, "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent, * * * in this case [the case of the taking of a temporary use and occupancy], as in the case of the condemnation of a fee, must be excluded from the reckoning."

These decisions clearly support the judgment below. In order to escape their effect, petitioner seemingly argues that its business was destroyed and that the alleged destruction constituted a taking of the business. Thus, it seeks to present a novel question which should be decided by this Court by asserting that for the first time mentioned in any

reported case, the Government, while purportedly taking only a temporary use of building and machinery according to its petition in condemnation, "for all practical common-sense purposes actually took a going business institution" (Pet. 33, par. 6). Accordingly, petitioner attempts to distinguish the *Petty Motor* and *General Motors* cases, *supra*, on the theory that its claim for the value of its trade routes and customers is not properly classified as loss of profits, damage to good will, injury to the business or like consequential losses which were held not to be compensable in those cases (Pet. 34-35, pars. 1-2; see also Pet. 34, par. 7 and Pet. 28-29).[3] On the other hand, cases which in terms hold that "destruction" of a business is not a "taking" and consequently not compensable are sought to be distinguished by reference to various irrelevant factors. Thus, as to *Bothwell* v. *United States*, 254 U. S. 231, 233, where this court held that nothing could be recovered for "destruction of business" because "there was no actual taking" of the business, petitioner suggests, without any support in the opinion, that the condemnee in that case had the opportunity to carry on the business elsewhere. And, as to

[3] Whether petitioner's claim is, in fact, one for loss of good will or some other type of business loss is immaterial. However, it may be noted that while petitioner denies that it seeks to recover for loss of good will (Pet. 34, par. 7; Pet. 35, par. 2; Pet. 39, par. 1), the very cases on which it relied in the trial court as justifying the method used by one of its witnesses in valuing the trade routes (R. 368-370) show that the value placed upon the trade routes represents good will. See *Appeal of Metropolitan Laundry Co.*, 2 B.T.A. 1062 (1925); *Pioneer Laundry Co.* v. *Commissioner*, 5 B.T.A. 821 (1926).

Mitchell v. *United States*, 267 U. S. 341, where this Court again held that the destruction of a business does not constitute a taking, specifically stating as a fact that the former owners were unable to reestablish their business elsewhere (p. 343), petitioners assume that the decision was based solely upon a lack of statutory authority to "take" a business (Pet. 38, par. 11).[4] Petitioner's assertion that *Joslin Co.* v. *Providence*, 262 U. S. 668—where it was held that injury to a business is not an element of constitutional just compensation—"involves a rule founded upon a statute" (Pet. 37-38) is equally without basis.

United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266, is apparently distinguished on the ground that a "going" business was not destroyed by the taking in that case and that if it had been, compensation would have been awarded for the business (Pet. 36-37, pars. 7-8). Accordingly, petitioner relies upon the *Powelson* case, *supra*, and upon *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312 (Pet. 35-37, pars. 4-8). Neither of those cases supports petitioner's contention. In the *Monongahela* case, *supra*, a franchise was held to be such "an integral part" of a lock and dam that it was taken when the property was taken. See *Omnia* v. *United States*, 261 U. S. 502, 513. The

[4] In this connection, it may be noted that there is nothing in the Second War Powers Act any more than in the statute involved in the *Mitchell* case to authorize the taking of a business.

distinction between the *Monongahela* case, where the franchise was held to have been taken, and cases like *Mitchell* v. *United States*, 267 U.S. 341, *supra*, where the business was "destroyed" but not "taken," is clearly made in the *Powelson* case, *supra*, at pp. 281-283.[7] Thus petitioner attempts to establish a case warranting review by this Court by eliminating entirely the general principles found in the prior decisions of this Court and by limiting each case either to its particular facts or to the special terminology used by the Court to describe the loss for which recovery was denied. However, both courts below have ruled that petitioner's business was not taken and that its claim is one for damages to its business which this Court has held on numerous occasions to be noncompensable (R. 244; vol. IV, p. 8; see *supra* p. 11). Consequently, the decision of the circuit court of appeals presents no new question which should be settled by this Court, nor is the decision in conflict with any applicable decision of this Court. No question of recovery for damage to or destruction of a business was presented or passed upon in any of the other cases relied upon by petitioner (Pet. 39-40).[8]

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[7] Moreover, "as this Court has in several cases pointed out" the *Monongahela* case rested primarily upon the doctrine of estoppel. *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 282, footnote 12.

[8] Petitioner refers (p. 32) to the Act of October 16, 1941, 55 Stat. 742, c. 445, as amended by Title VI of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 181, c. 199, secs. 601-602, 50 U.S.C. (1940 ed.) Supp. V, secs. 721-722, which

2. Petitioner's contention (Pet. 40-41) that interest on the award was improperly computed is without merit and presents no question for review by this Court. The use and occupancy condemned was for a specified term (beginning November 22, 1942, and ending June 30, 1943), extendible for additional yearly periods during the emergency at the election of the Secretary of War (R. 2). At the end of the initial period the term was extended for one year and again in 1944 and 1945 was extended for additional yearly periods (R. 12, 65, 82). Declarations of taking were filed and estimated compensation was deposited in court for each period (R. 16, 55, 56, 85). A few days after the jury's verdict the laundry was returned to petitioner (R. 95, 97). The trial court allowed interest on the sum found by the jury to be due for the initial term and each additional yearly period from the beginning of such period until the date of payment (R. 101-107). Interest was allowed on the sum awarded for damage, destruction and depreciation in the value of the property occasioned by the taking from the date of the verdict until payment (R. 105).

When property is taken prior to payment there-

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authorized the President to requisition military or naval equipment, supplies or munitions and machinery, tools or materials necessary to manufacture, service or operate such equipment, supplies or munitions. That statute has no bearing on this case, which is a proceeding brought at the request of the Secretary of War under Title II of the Second War Powers Act, *supra*, 56 Stat. 177, sec. 201, 50 U.S.C. (1940 ed.) Supp. V, sec. 171a, to condemn the temporary use of real property together with personal property located thereon or used therewith.

for, interest is allowed on the sum determined to be the value of the property as part of just compensation from the date of taking to the date of payment. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 306; *Albrecht v. United States*, 329 U. S. 599, 602. The provision in the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. sec. 258a, for interest on the sum finally awarded as the value of the property is merely a statutory embodiment of this rule (*Albrecht v. United States, supra*, at p. 605) which was properly applied in the instant case.

As the court below said (R. 13-14, vol. IV), "From a realistic viewpoint, what the Government took on November 22, 1942, was the right to use and occupy the laundry to June 30, 1943" and each time it extended the term it took the additional yearly period. The court was correct in holding that petitioner's right to compensation for use and occupancy for each period taken accrued successively as the terms were taken and that its right to compensation for injuries to and deterioration of its property attributable to Government use accrued at the end of the total term and did not, as petitioner contends, accrue on the total award on November 22, 1942.

3. In its questions presented, petitioner has referred to numerous rulings of the trial court which are alleged to be erroneous (Pet. 22-31).

Here, as below (see R. 6, vol. IV) most of the suggested errors are not argued in the brief. Insofar as they relate to the standard for ascertaining just compensation they are controlled by the ruling that business losses are not compensable (Questions III, IV, V, VI, IX, XII, XIII, XV, XVI, XVII, Pet. 23-31). Other suggested errors, such as the qualification of witnesses (Questions VII-VIII, Pet. 24) and the exclusion of rebuttal testimony (Question XI, Pet. 26) are matters resting within the discretion of the trial court and do not present questions for review by this Court.

It is urged that the trial court's conduct of the case was such that it destroyed all testimony and evidence introduced by defendant "from a common sense viewpoint" and calls for an exercise of this Court's power of supervision (Pet. 41-42). As in other questions suggested, petitioner's primary complaint is again exclusion of allegedly proper evidence of value, *i.e.*, evidence relating to its alleged business losses (see Pet. 42, par. 4; see also R. 165-166). Furthermore, as the court below stated (vol. IV, p. 11): "Taking the charge as a whole, however, we think it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of

the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry." The jury's verdict of almost $300,000 for the use of the property for 2½ years and for damages to and depreciation of the property is about half the fee value of the physical property as claimed by petitioner (*i.e.*, approximately $600,000, see R. 314, 316, 260, 264, 273, 423-424) and represents about one-third the alleged fee value of the physical property and the business (see R. 21-31). While, as the court below pointed out (vol. IV, p. 14), it was much less than the amount claimed by petitioner, it was well within the evidence and exceeded by about $40,000 the highest estimate made by any Government witness (see R. 735-737).

CONCLUSION

The decision of the court below is correct, and presents no conflict or question which should be decided by this Court.

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JULY 1948

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QUESTIONS PRESENTED

In November, 1942, the United States condemned the right, on a temporary basis, to use and occupy the laundry plant of the petitioner in order to provide laundry and dry-cleaning services to members of the armed forces. The property was taken for a term ending in June, 1943, together with a right to extend for annual periods which was exercised, the property finally being returned on March 23, 1946.

After an extended trial, judgment was awarded the petitioner in the amount of approximately $300,000, a sum about half of the fee value of the petitioner's physical properties according to its own estimates. Petitioner was accordingly awarded for a three years, seven months use by the Government, half of the market value of the premises, and obtained the return of the entire plant and property. Although its facilities at the date of restoration were, according to it, worth $400,000, the petitioner now claims to be entitled to an additional award of approximately $300,000, and the questions presented are:

1. Whether the courts below were correct in holding that just compensation should be the value of the use of the property (computed on a fair annual rental value) plus damages for failure of the Government to return the property in the same condition as when it was taken, ordinary wear and tear excepted.

2. Whether the court below erred in disallowing compensation for the alleged destruction of value of trade routes, i. e., the patronage of customers served by the laundry.

3. Whether there was a reversible error committed in other rulings of the trial court.

STATUTE INVOLVED

The pertinent provisions of the Second War Powers Act (Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, April 11, 1918, 40 Stat. 518, 50 U. S. C. 171, and by Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, Sec. 201, 50 U. S. C. (1940 ed.) Supp. V, 171a) are as follows:

> The Secretary of War * * * may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, * * *. Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law.

STATEMENT

In order to provide laundry and dry-cleaning services for members of its armed forces, the United States filed a petition on November 21, 1942, under authority of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, 171a, to condemn the right to use and occupy certain property in Omaha, Nebraska. The property, known as the Kimball Laundry, and owned and operated by the Kimball Laundry Company, consisted of real estate, together with all improvements thereon and all personal property used in connection with the laundry except delivery equipment (R. 1–5). The estate sought in the petition was the right to use and occupy the property for a period ending June 30, 1943, and for additional yearly periods for the duration of the national emergency at the election of the Secretary of War (R. 2). The district court granted the United States immediate possession of the property, and, with A. L. Jacobberger (secretary and operations manager of the Kimball Laundry Company) as superintendent, the plant was operated as a military laundry (R. 5–8, 265–267). The term taken was extended for additional yearly periods, the last extension terminating on June 30, 1946 (R. 12–16, 65–67, 82–85). From time to time, the United States filed declarations of taking and deposited estimated

compensation in court for the various periods taken (R. 16–18, 55–56, 67–68, 85–86).[1] The Kimball Laundry Company withdrew the sums thus deposited without prejudice to its contentions in the case (R. 52–54, 58–59, 71–72, 88–90).

On August 23, 1943, the Kimball Laundry Company filed an answer to the condemnation petition alleging that its going business, although not described or referred to in the petition, had been taken by the United States, that the taking was not that of a temporary use, but rather of title to all of its business assets, so that the proper measure of compensation was not rental but was the full value of its laundry and dry-cleaning establishment as a going concern in the sum of $1,000,000 less credits to the United States for supplies already paid for and certain personalty not taken, leaving a net sum of $949,979.40 for the value of the physical property and the business alleged to have been taken (R. 21–31). In accordance with Nebraska law, six appraisers

[1] On May 11, 1943, the term was extended to June 30, 1944 (R. 12). On June 19, 1943, the United States deposited $30,140 as estimated compensation for the term ending June 30, 1943 (R. 16–18). On April 6, 1944, $50,000 as estimated compensation was deposited for the term ending June 30, 1944 (R. 55–56). On May 31, 1944, the term was extended to June 30, 1945, and $50,000 as estimated compensation to cover that term was deposited on August 10, 1944 (R. 65, 67–68). On May 28, 1945, the term was extended to June 30, 1946, and $65,000 as estimated compensation for that period was deposited on August 8, 1945 (R. 83, 85–86).

(appointed to determine just compensation for the taking) made their report on November 19, 1943, awarding the Kimball Laundry Company the sum of $74,940 per year for the estate taken and stating that they had made no allowance for damage for loss of patrons (R. 31–38). Both the United States and the Laundry Company appealed from the appraisers' award (R. 39–40) and the Company filed what it called a "petition in error" in which it asked the court to correct the award of the appraisers and enter judgment as a matter of law in the sum of $949,979.40, for the fair and reasonable value of its entire property plus costs and interests (R. 44–52).

A pretrial hearing was had at the request of the Kimball Laundry Company on May 17, 1945 (R. 55; see R. 90), and, at the beginning of the trial before a jury, the district court ruled on various motions pending before it (R. 183). The Government's motion to strike the answer and the petition in error was granted, the court stating that the Government's objection that the answer contained allegations of evidence and conclusions of law rather than facts was well taken and furthermore that he did not think pleadings were necessary (R. 76–82, 183). During the course of the trial (on March 18, 1946) the Kimball Laundry Company filed a second "petition on appeal" in which it alleged, among

other things, that it had built up highly valuable trade routes over the years by definite contractual relationships for laundry and dry-cleaning services, that those contracts were destroyed by the taking, that the fair, reasonable market value of the property as a going concern was over $1,000,000, that the United States had no right or authority to take a temporary use of the property unless it paid the full damages which were alleged to be over $1,000,000 (R. 91–93). It was further alleged that if the court determined that the value of a temporary use would be just compensation, then all elements of value inhering in the property, including the value of the trade routes, which was alleged to have been destroyed, should be given consideration and fully included (R. 93–95). A motion of the Government to strike this petition was granted (R. 95, 863).

The trial before the jury lasted two weeks, beginning March 4, 1946, and ending March 19, 1946 (R. 183, 863). The testimony may be summarized as follows:

Three officers of the Kimball Laundry Company, who were the principal stockholders (R. 265, 384, 443–444), gave their opinions as to the amount of compensation to which the company was entitled by reason of the taking of its property. A. L. Jacobberger, secretary and operations manager (R. 265), testified that the total value

of the use of the property for three years and seven months (November 22, 1942, to June 30, 1946), including damages to the property incurred during the Government's occupancy, was $570,000 (R. 318). Harry Jacobberger, president of the company, estimated that value to be $580,000 (R. 432–433; cf. R. 423–424), and Fred Jacobberger, former vice president in charge of sales promotion, expressed the opinion that such value was $570,000 (R. 454). All three witnesses arrived at their figures by allowing $220,799.09 for physical damage to the buildings, machinery, and equipment (R. 319–320, 343, 424, 456). The remaining $350,000 to $360,000 represented the witnesses' opinions as to value of the use of the property for three years and seven months at a rate of approximately $100,000 a year (R. 320, 345–346). The method by which the use value for the period of Government operation was computed by the three witnesses varied. For example, A. L. Jacobberger's estimate was composed of approximately $25,200 allowed for taxes and insurance at $7,000 per year (R. 320–321, 343), some $96,000 for depreciation (R. 324–325, 332–334, 351–353), miscellaneous expenses (storage of customers' clothing and the trucks, which were not taken, reconditioning the trucks and litigation expenses) in the sum of $16,400 (R. 326–327, 356), an allowance of $75,000 for expenses during the period which would elapse between the time of surrender

of possession by the Government and the time the laundry could be put back into operation (R. 330–331, 360–361), and an allowance of approximately $130,000 for a net return to the owners for the use of the property, based on capital investment in land, building, machinery and equipment (R. 332–333). Harry Jacobberger, in explaining what his estimate of $100,000 per year for the use of the property included, stated "nothing but the rental of a business" and that it was "the value that plant had to us as a going concern" (R. 426–427). Fred Jacobberger testified that in arriving at the sum of $100,000 per year he had allowed $26,000 per year to be set aside for depreciation, $7,000 per year for insurance and taxes, and a return of $65,000 per year on investment, representing 10% of $650,000, his value for the entire physical plant (R. 456–458). All three of these witnesses stated on cross examination that the fee simple value of the entire physical properties of the laundry company on the date of the taking was between $600,000 and $650,000 (R. 330, 424, 457).

For the purpose of showing the capacity of the plant, that it was a going concern and the volume of business, the laundry company was permitted to introduce exhibits showing the yearly receipts from various types of laundry and dry-cleaning services rendered from 1936 through 1942 (D.

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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1948

KIMBALL LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 63

KIMBALL LAUNDRY COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 3–14, vol. IV) is reported in 166 F. 2d 856. The district court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1948 (R. 15, vol. IV). The petition for a writ of certiorari was filed on May 28, 1948, and was granted on October 11, 1948. The jurisdiction of this Court rests on 28 U. S. C. 1254.

Ex. 10, R. 229–235; D. Ex. 12, R. 238–242), the amount of laundry work done each year from 1932 through 1941, measured (according to type) by the number of pieces, pounds or bundles handled (D. Ex. 24, R. 279–283), the total number of customers being served on November 21, 1942 (D. Ex. 11, R. 235–237), and the prices being charged for laundry and dry-cleaning services under O. P. A. ceilings in November 1942 (D. Exs. 28, 29, R. 295–297).

Evidence was also admitted on behalf of the Kimball Laundry Company that the original cost of the land was $50,000 (R. 385–386), that the fee value of the land in November 1942 was $30,000 (R. 314, 389), that the original cost of the building in 1925 was $199,945.95, the cost of an addition to the building in 1935 was $33,356.56 and the reproduction cost as of November 21, 1942, was $280,348, no allowance being made for depreciation (D. Ex. 19, R. 261–264). Evidence was also admitted to the effect that the cost of putting the building back in the same condition as it was in 1942 was $35,000 (R. 304–306, see D. Exs. 41, 42, R. 408, 412–415, 419), that the value of power equipment and machinery, including the boilers, was $62,928.98 in November 1942, and $30,260.53 in March 1946, leaving a difference in value before and after the taking of $32,667.55 (D. Ex. 23, R.

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* This represents gross income. Compare Defendant's Exhibit 7 (R. 221) for the years 1936–1942.

270–273, see also D. Exs. 43, 44, R. 408–412, 415–419, 420), that the value installed of all other machinery and equipment as of November 21, 1942, was $273,831.39 and as of November 1945 was $120,699.75, leaving a difference in value before and after the taking of $153,131.54 (D. Ex. 21, R. 247–251, 253–254, 258–260).[3]

On behalf of the United States two witnesses testified as to the fair annual rental or "use value" of the property taken, including damages incurred during the Government's use of the property. Cornelius G. Weber, an engineer and appraiser experienced in valuing industrial plants (R. 722–723), testified that the fair annual rental value was $70,000 or a total of $257,000 for the period from November 22, 1942, to June 30, 1946 (R. 729–735; Govt. Ex. 22, R. 735–737). He arrived at his estimate of value by allowing the following sums: $27,300 per year as a reasonable return on the value of the entire plant (i. e., 6% of $455,000, which was in his opinion the fair and reasonable value of the plant) (R. 728–730), $9,000 per year for taxes and insurance, $27,771.79 per year for depreciation on the building and machinery, including both normal and abnormal depreciation, the latter due to the heavy use of the property by the Government, $6,000

[3] As is the case with reference to many of the exhibits, Defendant's Exhibit 21, consisting of 23 pages, is not printed in full in the record (see R. 142–149).

for contingencies and uncertainties regarding expiration of the term, making a round total of $70,000 per year or $252,000 for 3.6 years (R. 730–733). These figures were adjusted later in the light of certain information obtained subsequent to the making of the appraisal and Weber gave as his final estimate of value for the term taken, including restoration and repair costs, the sum of $257,000 (R. 733–735; Govt. Ex. 22, R. 735–737). On cross-examination, Weber stated that the reproduction cost new of the entire plant without allowing for depreciation due to wear and tear or functional obsolescence, would be $642,925.20 (R. 744–746; see also Govt. Ex. 23, R. 751–752).

Lewis C. Sholes, a real estate man and appraiser with many years of experience, had examined and appraised the property shortly before it was taken by the United States, had observed it during the Government's occupancy and had examined and appraised it in the latter part of 1945 (R. 760–762, 771, 773, 784). He testified that the fair and reasonable rental value of the property including damages resulting from the use by the Army was $65,663 per year (R. 771) or a total of $253,066.80 for the 3 years 7 months' period including cost of repairs but not including the cost of moving back certain machinery and equipment which had not been used by the Government but had been removed

and stored at Fort Omaha (R. 772–776; Govt. Ex. 24, R. 777–778). Sholes' estimate of value was made up as follows: a return on investment of 5% of the value of the land and building, or $10,380 per year, and 7% of the value of machinery and equipment, or $15,813 per year, $23,220 per year for normal depreciation on the building, machinery and equipment, $4,500 per year for taxes, $750 per year for insurance, $2,000 per year for the owner for management and $9,000 per year for abnormal use of the property by the United States, making a total of $236,386.80 (R. 769–772). To this figure, Sholes added $16,680 for restoration and repair costs not included in his estimate of $9,000 per year for abnormal use, making a final total of $253,066.80 for the taking (R. 772–776, Govt. Ex. 24, R. 777–778). On cross examination, Sholes stated that in determining the total value of the property he had estimated reproduction cost new prior to deducting depreciation at $660,474.36 (R. 783–784).[*]

Appellant objected to the qualifications of these witnesses to give their opinions of value and to their testimony as to rental value on the ground that there was no showing that a laundry

[*] Sholes' value of the entire property after allowing for depreciation was as follows: land, $17,600 (R. 767), building, $190,000 (R. 767–768), power plant, $12,500 (R. 768), other machinery and equipment, $213,400 (R. 768), making a total value of $433,500 (R. 768).

had ever been rented and that this was not a proper way to value a temporary use. These objections were overruled (R. 728–729, 767–769).

Exhibits were introduced and several witnesses testified on behalf of the Government as to repairs and replacements made by the Government during its occupancy (Gvt. Exs. 2, 3, 4, 5A, 6, 7, 8, R. 461–478, 498–507), the estimated fair and reasonable cost of painting and otherwise repairing and restoring the building, building equipment, power plant and utility equipment to first-class condition (R. 478–483, 491–496, 507–510, 520, 531, 544, 548, 601–608, 611–620; Govt. Ex. 17, R. 636–640; see also R. 690–692), and the estimated fair and reasonable cost of repairing, replacing and moving back into their original position all laundry and dry-cleaning machinery and equipment so that the plant would be in a good and efficient operating condition (Govt. Exs. 10, 11, 12, 12A, 21, R. 549–567, 571–572, 647, 649–655). The total sum for repairing the building, building equipment and power plant equipment was $37,521.34 (see R. 633, 640, 690–692), and the total sum for the repairs to laundry and dry-cleaning equipment was $20,471.27 (see R. 631–632, 645), making the cost of all repairs $57,992.61 (see R. 633, 690–692). Appellant's objections to the Government's testimony and exhibits relating to this subject made on various grounds were overruled (R. 504–505, 555–556, 631–632, 634–635, 646–648).

On rebuttal, Peter W. Dahlquist testified that he had examined the laundry and dry-cleaning equipment which Government witnesses had said could be repaired for the total sum of $20,471.27 and that in his opinion it would cost $34,309.42 to repair it (R. 809–812, 814; D. Exs. 48, 49, 50, R. 822–823). He further stated that his estimate of the cost of parts was very close to that testified to by the Government's witnesses but that there was a big difference between the amount allowed by him for the labor costs and the amount allowed by the Government witnesses (R. 817). Certain other evidence offered on rebuttal was excluded on the ground that it was not proper rebuttal (R. 826–830; 833–838, 846–849).

During the trial several exhibits prepared by certified public accountants from the books of the company, which were offered in evidence by the Fimball Laundry Company, were excluded. The excluded exhibits were as follows: Defendant's Exhibits 1 and 3, two compilations showing the disposition of the funds of the laundry company, one from 1924 through 1942, and the other from 1938 through 1942 (R. 188–191, 196–197, 200–201); Defendant's Exhibit 2, a compilation of the total cost of the company's fixed assets, i. e., real estate, building, machinery and equipment (R. 192–200); Defendant's Exhibit 4, showing the net profits of the company before and after deducting income tax and depreciation taken on income tax returns and also showing

the amount of income tax paid and the amount of depreciation taken on income tax returns from 1924 through 1942 (R. 201–204); Defendant's Exhibit 5, showing the net profits of the company from 1933 through 1942 before and after deducting officers' salaries, income tax and depreciation taken on income tax returns, the amount of the latter items, the surplus on hand January 1, 1933, the dividends paid from 1933 through 1942 and surplus on hand December 31, 1942 (R. 205–206); Defendant's Exhibit 6, containing a comparative balance sheet for the years 1923 and 1942 and showing, among other things, the percentage of officers' salaries to capital stock and surplus, the percentage of dividends to capital stock and surplus and the percentage of repairs to the accumulated cost of equipment from 1924 to 1942 (R. 207–218, 855–857); Defendant's Exhibit 7, showing the gross income of laundry from 1924 through 1942 (R. 219–221);[5] Defendant's Exhibit 13, showing the commissions and total salaries and commissions paid the drivers on the laundry routes (R. 243–244); Defendant's Exhibit 14, identified as "purporting" to evaluate the customers served by the laundry during

[5] In excluding Defendant's Exhibit 7, the trial court stated that it would be admitted if there were attached a statement of net earnings (R. 219–221). No offer of proof in compliance with this suggestion was made. Gross income for the years 1936–1942 was admitted elsewhere. See footnote 2, *supra*.

1942 (R. 368–370); Defendant's Exhibits 15, 16, and 17, showing the estimated operating losses which it was contended would occur during the first three years of operation after the Government surrendered possession of the plant (these losses represented the cost of rebuilding the trade routes) (Pet. 8) (R. 370–383); column 1 of Defendant's Exhibit 21, showing the original cost installed of all machinery and equipment (except power machinery and equipment) (R. 250–251, 257–260).

The trial court also rejected an offer to prove by witness A. L. Jacobberger that the value of the "Kimball Laundry Company" at the time of the taking "exclusive of the delivery trucks, exclusive of any element of good will, and exclusive of the loss of profits" was $987,524.32 (R. 315). The offer showed that this sum included the following items: $280,348 (value of building), $273,831.39 (value of machinery and equipment), $62,928.08 (value of power equipment), $30,000 (value of land), and $340,516.85 (value of trade routes as a capital asset evaluated by number of customers) (R. 316). Further offering to prove that the value of the property to the company upon its return by the Government would be $426,208.28, it was stated that the purpose of the offer was to show that the proper measure of damages was the difference between the foregoing alleged values

of the company before and after the taking or $561,316.04 (R. 316).

At the close of the trial, the court instructed the jury (R. 150–165) to the effect that the owner of property taken for public use is entitled to just compensation, i. e., the full and perfect equivalent in money for the property taken, that he is entitled to be put in as good a position pecuniarily as if his property had not been taken. After stating that in fee takings the measure of compensation is fair market value of the property taken and can be fairly easily determined, the court pointed out the difficulty of determining market value in temporary takings where there is no "market" price, and discussed the various items of evidence admitted which the jury was to consider in an effort to find a "yardstick" for measuring the fair and reasonable value of the use of the property. The court also instructed the jury that they were to determine the fair and reasonable value of the use of the property or annual rental (explaining that this value is sometimes called the value of the use and sometimes rental) and that, in addition, they should determine and award compensation for destruction, damage, or depreciation of the property. The jury was further instructed that since it had appeared on cross examination of some of the owner's witnesses who had given their opinions of the value of

the property that they had considered certain elements which were not proper, the testimony of those witnesses, insofar as the improper elements were concerned, should be disregarded (R. 156–157, see also R. 167).

Petitioner objected to the instructions to disregard certain testimony of its witnesses and objected generally because the instructions were not explicit enough with regard to the element of damages and because the use of the word "rental" by the court in the instructions was not proper and because here, as well as throughout the trial, the court failed and refused to recognize as an element of damage the destruction of the trade routes and customer lists (R. 165–166). Specific exceptions were taken (R. 166) to all instructions given as requested by the Government (see R. 163–165, 169–172) and to the failure to give instructions requested by petitioner (see R. 172–178).

The jury returned its verdict on March 20, 1946, awarding a total sum of $297,776.03 for the taking of the property for a term beginning November 22, 1942, and ending June 30, 1946, and including compensation for failure to return the property in the condition it was in on November 22, 1942 (R. 95–96). Special findings were made fixing the annual compensation payable at $70,000, making the total rental for the entire period of 3.6 years the sum of $252,000 and

fixing the amount payable for failure to return the property in the same condition as when taken in the sum of $45,776.03 (R. 96).

A motion in arrest of judgment filed March 27, 1946, was overruled (R. 97–101; see R. 107). On April 9, 1946, judgment was entered in the amount of the verdict and interest at 6% was awarded from November 22, 1942, on the amount due for the rent or use of the property for the period November 22, 1942, to June 30, 1943, until paid and on the amount due for each subsequent yearly period from the beginning of such period until paid, giving credit from time to time for the sums deposited as estimated compensation when declarations of taking were filed (R. 101–107). Interest was also awarded on the sum of $45,776.03, the jury's award for failure to return the property in the same condition as when taken, from March 20, 1946, the date of the verdict, until paid (R. 105).

On March 23, 1946, the United States surrendered possession of the property to the Kimball Laundry Company (R. 97). On June 11, 1946, the United States deposited in court $98,124.27, the amount remaining due to satisfy the judgment (see R. 138).* Upon application, the Kimball

*The judgment reserved jurisdiction in the trial court for any additional claim which might arise by reason of an extension of the time beyond June 30, 1946, or by reason of any additional damage to the premises occurring after the verdict and prior to surrender of possession (R. 106). However, on

Laundry Company was permitted to withdraw $75,000 of this sum, the order allowing the withdrawal stating that it was without prejudice to the company's right to appeal (R. 137–140).[7]

A motion for new trial filed April 19, 1946 (R. 107–126), was denied on August 16, 1946 (see R. 140).

Upon appeal by petitioner to the United States Court of Appeals for the Eighth Circuit, the judgment was affirmed, the court holding that the United States had not taken the Laundry Company's business, trade routes or customers, that while the Government's occupation of the plant undoubtedly disrupted and damaged the company's business such damage is not compensable under the Fifth Amendment (vol. IV, pp. 8–10). Pointing out that, even if the taking of the temporary occupancy of the laundry were to be given

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May 8, 1946, the parties entered into a stipulation fixing the sum of $18,089.55 as the amount to be paid by the Kimball Laundry Company for certain machinery and parts owned by the United States and desired by the company, and agreeing that the sum of $200 covered in full any and all claims of every kind and nature for damage caused to the premises by the United States from and after March 20, 1946, and prior to the date of surrender of possession (R. 134). It was further agreed that $200 with interest until paid should be added to the judgment and that $18,089.55 should be credited to the judgment as if paid in cash on March 23, 1946 (R. 135). Judgment was entered on the stipulation on the same day (R. 136–137).

[7] On September 30, 1948, the district court, upon motion by the Company, permitted the withdrawal of an additional $20,000 from the sum deposited to satisfy the judgment.

the legal effect of the taking of fee title, damage to the company's business would not be compensable, the court held that what was taken in the instant case was the temporary use and occupancy of the laundry, that just compensation for the right to use and occupy property temporarily is the value on the market of the use and occupancy, together with compensation for any destruction, damage and depreciation in value of the property occasioned by the temporary use and does not include business losses (vol. IV, pp. 8–10). The court also held that interest on the award had been properly computed (vol. IV, pp. 13–14).

SUMMARY OF ARGUMENT

I

The Government here condemned the temporary use of the laundry plant, including land, buildings and equipment. It is well settled, as the courts below held, that just compensation for such a taking is measured by the market rental value of the temporary occupancy taken. In addition, compensation must be paid for the failure of the Government to return the property in the same condition as when it was taken, ordinary wear and tear excepted. The present case was tried in accordance with these principles which have emerged from long experience as fair and just guides for the determination of the governmental obligations flowing from an

exercise of the power of eminent domain. Petitioner apparently argues that its compensation should be determined either by the full fee value of the property or by the difference between such value at the time the property was taken and the time of its return to petitioner. But since the United States did not take the property absolutely, petitioner plainly is not entitled to recover its fee value. Petitioner's advocacy of the "before and after" measure of just compensation is put forward in the instant case only as a means of inclusion in the judgment of an award for the alleged taking of its "trade routes". We shall show in point II that the courts below properly excluded evidence relating to the trade routes. In any event, petitioner's "before and after" theory of valuation would make compensation depend on fluctuations in the market which, very often, would have no relation whatever to the value of the use taken.

II

Petitioner's real contention is that its trade routes, i. e., the patronage of its customers, were taken and the value thereof should have been included in the award. The evidence which was excluded by the trial court was offered to support this claim. The courts below were correct in holding that this constituted simply an attempt to recover for a business loss which is not allowable in this proceeding.

A. It is well settled that business injuries, such as loss of profits and damage to good will, are like other consequential losses resulting from the taking of private property for public use, and may not be considered in determining the compensation payable under the Fifth Amendment. Just compensation is the value of the interest taken.

B. It is plain that the Government had no interest in and did not take the company's business, trade routes or customers. It simply took the physical properties. That thereby petitioner's business may have been disrupted or injured does not mean that the business was taken. *Omnia Co.* v. *United States*, 261 U. S. 502; *Mitchell* v. *United States*, 267 U. S. 341. A conclusion that petitioner was injured through loss of patronage can be based not on any factual evidence presented by petitioner but on sheer speculation as to conditions at the time of return of the property.

C. The fact that in the instant case the property was taken temporarily rather than permanently does not change this result. In *United States* v. *General Motors Corp.*, 323 U. S. 373, this Court, while holding that when a part of a condemnee's interest is taken, the necessary cost of moving, storing, and returning personal property located in the building taken temporarily might be considered, in the peculiar circumstances of that case, in determining market

price for the temporary occupancy, also held that, as in the case of fee takings, proof of value peculiar to the owner, such as the value of good will or of injury to the condemnee's business, must be excluded. There is no warrant for the allowance of such business losses in a condemnation proceeding. The value of a business or its good will is attributable to many varying and speculative factors, such as skill of management, the nature and extent of competition, and general business conditions, among other things. Such value is highly speculative and should have no part in the determination of the value of what was actually taken, i. e., the physical property.

In the instant case, petitioner was permitted to introduce all relevant evidence relating to value of its plant and the fact that it had a profitable business located on the property. The claim for loss of trade routes constituted simply an attempt to recover for injury to good will or business loss and was properly rejected.

D. The evidence relating to petitioner's good will value ("trade routes") reflects the typically speculative nature of such value.

III

Other alleged errors specified as grounds for reversal are without merit.

A. The qualification of witnesses to express an opinion of value is a matter within the discretion of the trial court and its decision is conclusive unless there has been an abuse of

discretion. No abuse of discretion can be shown here.

B. Admission or exclusion of rebuttal testimony is a matter within the discretion of the trial court and its decision will not be reversed in the absence of a clear abuse of discretion. There was no abuse of discretion here.

C. When property is taken prior to payment therefor, interest is allowed as part of just compensation from the date of the taking until payment. Here, the property was taken for a specified term with the option to renew the term for additional yearly periods. The option was exercised from time to time thus extending the term from year to year. Since the taking was one of yearly periods and since the jury awarded compensation on a yearly basis, interest was properly computed on the sum allowed for each period from the beginning of the period until paid. The Declaration of Taking Act does not require a different result. Compensation for the failure to return property taken temporarily in the same condition as when taken, ordinary wear and tear excepted, is not due until the property is returned. Interest on the sum awarded for that purpose does not begin to run until the date of return. Since interest is not allowable when just compensation is fixed by agreement of the parties, petitioner's claim to interest with regard to certain supplies was properly disallowed.

ARGUMENT

I

THE PETITIONER HAS RECEIVED FULL AND ADEQUATE COMPENSATION FOR THE TEMPORARY USE OF THE PROPERTY, UNDER ESTABLISHED RULES PROPERLY APPLIED BY THE DISTRICT COURT

By every objective test, petitioner has received fair and adequate compensation. It has obtained, after the three years and seven months of use of its plant by the United States, a sum almost half the total market value of the fee title (according to petitioner's own estimates)—plus the return of the entire property. The award was based on the market rental value of the plant (including equipment), plus an allowance to restore the property to its original condition, and was thus completely in accord with established authority. It has long been held that the measure of compensation for the taking of a temporary interest in property such as was taken here is market rental value. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382, 383; *Phelps* v. *United States*, 274 U. S. 341, 342–343; *Kansas City Southern Ry. Co.* v. *Commissioner of Internal Revenue*, 52 F. 2d 372, 379–380, 381 (C. C. A. 8), certiorari denied, 284 U. S. 676; *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.); *Johnson* v. *United States*, 2 C. Cls. 391, 415–416,

419; *Johnson* v. *United States*, 4 C. Cls. 248, 251; *Pope* v. *United States*, 26 C. Cls. 11, 13. Such a measure has been applied almost universally by the district courts in the many recent cases arising during the war where the Government condemned only the temporary use of property which would not be needed thereafter. *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005 (D. Del.); *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *7.41 Acres of Land in Camden*, 63 F. Supp. 43, 47 (D. N. J.); *United States* v. *40.558 Acres of Land in New Castle County*, 62 F. Supp. 98 (D. Del.); *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (D. Del.); *United States* v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *5.741 Acres of Land in Flushing & Arde Bulova*, 51 F. Supp. 147, 148 (E. D. N. Y.).[8]

[8] The only cases found in which the courts have departed from the standard of market rental value are cases relied upon by petitioner (Br. 123–124). *United States* v. *9.94 Acres of Land in City of Charleston*, 58 F. Supp. 478 (E. D. S. C.) stands alone against the great weight of authority and its reasoning has been specifically rejected in subsequent decisions. E. g. *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.). In *United States* v. *Bauman*, 56 F. Supp. 109 (D. Ore.), also relied upon by petitioner (Pet. 59; Br. 124), the United States filed a petition in 1942 to condemn a term for three years with the right to cancel at the end of any year. The court merely held that

The value of a temporary interest is thus variously spoken of as "the market rental value of the temporary occupancy taken," *United States* v. *General Motors Corp.*, 323 U. S. 373, 382–383, "the fair market value of the use," *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005, 1008 (D. Del.), or more frequently the convenient designation of "fair annual rental" is used. *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389 (D. Del.). In temporary takings, as well as in fee takings, there is sometimes no "market" for the property taken. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378. But "where, for any reason, property has no market, resort must be had to other data to ascertain its value * * *." *United States* v. *Miller*, 317 U. S. 369, 374. As the court said in *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (D. Del.), "Certainly an expert appraiser can determine

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the United States could not amend its petition and file a declaration of taking to acquire a term for one year with a right to renew for additional yearly periods for the duration of the national emergency without including compensation in its deposit for the value of the right of renewal. In *11,000 Acres of Land in Smith County, Tex.* v. *United States*, 152 F. 2d 566 (C. C. A. 5), certiorari denied, 328 U. S. 835 (see Br. 123), the court recognized and followed the general rule in valuing the fee owner's interest, but because of the peculiar nature of an oil and gas lease, held that a different measure must be applied to determine compensation for the lessee's interest.

a fair annual rental, determined as though the government had rented the property for a year with an option to renew from year to year * * *." Thus, as will be shown, *infra*, pp. 32–34, expert witnesses in the present case gave their opinions as to the value of the use of the property or the fair annual rental and "other data" was admitted as bearing on the value of the temporary interest taken.

In addition to the market rental value of the property during the period of the temporary taking, the award in such cases must include an allowance to enable the return of the property in as good condition as when the United States took possession, ordinary wear and tear excepted.[9] This principle, which was followed by the courts below, is well established. *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.); *United States* v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 263 (D. Md.); *United States* v. *14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005 (D. Del.); *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, 53 F. Supp. 767, 770–771 (N. D. Cal.); *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389 (D. Del.). If by reason of the use made of the premises by the

[9] Compensation for ordinary wear and tear is included in fixing market rental value.

United States, they are damaged beyond ordinary wear and tear, the owner is entitled to compensation for the damage so caused. Compensation for this type of damage is generally determined by reference to the difference between the market value of the property in its condition before and after the taking. See, e. g., *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F. Supp. 454 (N. D. Cal.); *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, 53 F. Supp. 767, 770–771 (N. D. Cal.). When, as here, the damage results simply from heavy usage and from the change in location of machinery, the difference in market value caused by the Government's use of the property is generally shown by the cost of restoring the property to its former condition. E. g. *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.).[10]

[10] As will be noted from the cases cited above, there is a divergence of opinion among the lower federal courts as to the time when compensation for damage resulting from the use of the property is to be determined. One view is that, if the owner so desires, it should be determined at the time of the trial even though the amount of the damage may be speculative at that time. *United States* v. *60,000 Square Feet of Land (Oakland Hotel)*, *supra*. Another is that the trial court should retain jurisdiction to determine such compensation when the property is returned. *United States* v. *Certain Parcels of Land in Baltimore*, *supra*; *In re Condemnation of Lands for Military Camp*, *supra*. And a third view is that this compensation cannot be determined and awarded in the condemnation proceeding, but must be recovered in a separate suit brought for that purpose after the property is returned. *United States* v. *14,750 Acres of Land in Christiana Hun-*

In the present case evidence was admitted showing both the market rental value of the property for the period taken and the amount of damage resulting to the property from the use made of it by the Government. Expert witnesses for both sides testified to the total sum which, in their opinions, the owner was entitled to recover and explained how they arrived at the sums testified to. An examination of the testimony shows that the methods used by the Government's witnesses and by those of petitioner in arriving at their total estimates were similar. Both allowed various amounts for the rental value of the property (R. 320, 424–425, 456, 728–737, 768–778).[11] The

dred, supra, and cases cited therein. It is immaterial for present purposes which view is correct since the trial occurred at a time when it was known that possession would be surrendered within a very short time. The issue as to the amount of compensation for damage to the property resulting from the Government's use up to the time of the trial was submitted to the jury without question by both parties and compensation for damage occurring after the trial and before possession was actually surrendered, was included in a supplemental judgment upon stipulation by the parties (R. 134–137). The amount of both judgments has been deposited in court (R. 138).

[11] Petitioner's witnesses referred to this sum as the amount which it was "entitled to for the use and occupancy * * * based on my knowledge and talking with real estate men who are in the business of investing money for the use of that kind that are rented * * *" (R. 320), the amount "the use of the plant per year was worth * * * over and above the amount of the damage to the building and machinery and equipment" (R. 424–425) and "the fair value for the temporary use" (R. 456). The Government's witnesses referred

items included by both in computing the fair rental value were taxes, insurance, normal depreciation and a net return on investment, i. e., a net return on the value of the physical assets (R. 320–321, 324–325, 332–334, 351–353, 456–458, 728–737, 769–770, 777–778). Other evidence admitted on behalf of petitioner as bearing on the value of the use of the property was the original cost of the land and building, the value of the land in November 1942, the reproduction cost of the building in November 1942, and the value of the machinery and other equipment in November 1942 (R. 258–264, 270–273, 314, 385–386, 389).

In addition, witnesses for both parties allowed various sums for damages to the property resulting from its use by the Government (R. 319–320, 343, 345, 424, 456). The latter sums were sometimes referred to by the petitioner's witnesses as the amount necessary to repair and replace parts of the building, power plant, machinery and equipment (R. 345, 424, 456). At other times, petitioner's testimony and exhibits referred to these sums as representing the cost of putting the building back in the condition in which it was in 1942 (see R. 304–306), and the difference between the value of all machinery and equipment (including power equipment and laundry and dry cleaning equipment) before the taking and its

to it generally as "fair annual rental," "estimated fair rental," or "use value" (R. 729–730, 735–736, 771).

value at the time of the trial (see R. 260, 272–273). The amount allowed by the Government's witnesses for damages resulting from the use of the property was included in their estimates of fair annual rental as depreciation due to abnormal or excessive use of the property (R. 730–732, 771). To this was added a lump sum computed at the time of the trial for the actual cost of restoration and repair not included in the abnormal depreciation allowance (see R. 735–737, 777–778). Other testimony was also introduced by the Government as to the cost of repairs and restoration (see R. 557–567, 631–633, 647–655, 690–692).

After instructing the jury generally as to the meaning of just compensation, i. e., that it meant that the owner should recover the full and perfect equivalent in money of the property taken and that the owner was to be put in as good a position pecuniarily as if his property had not been taken, and that the measure of just compensation is the fair market value of the property at the time of the taking, the trial court pointed out that while the standard of fair market value works very nicely in cases of fee takings, it is much more difficult to apply it in cases of temporary takings because, as a general rule, as in the instant case, there is no market for the property for a temporary use (R. 150–153; see also R. 154, 162, 164).

As the court stated, "There is no evidence of any laundry having been sold on the market. That being so, you have to begin to look around to find another 'yardstick'" (R. 153). Continuing, the court commented on some of the evidence admitted for the purpose of showing the fair rental value or value of the use of the property for the period taken and the principles applicable in arriving not only at that value but also in arriving at the amount of depreciation (R. 154-161), pointing out that if depreciation for ordinary wear and tear was included in fixing the rental for the use of the property it should not again be included in the damages awarded to repair or restore the property (R. 158). The court further instructed the jury to bring in a general verdict fixing a lump sum covering both the value of the use of the property and the damages to the property and to make special findings (1) as to the amount allowed as "annual rental or the amount that you determine for the use of the property per annum" and (2) as to the compensation payable for failure to return the property in the condition it was on November 22, 1942 (R. 161).

Thus, it appears that evidence was admitted and the jury was instructed in accordance with principles generally applicable to takings of this kind. Although the court below observed that the trial court's charge was not a model of conciseness

or accuracy, it is submitted that, as that court said (R. 11, vol. IV):

> Taking the charge as a whole * * * it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry.

But we believe that a fair distillation of petitioner's thirty-two points relied upon for reversal (Br. 34–108) is its contention that it is entitled to the inclusion in the award of the value of

its trade routes, i. e., the patronage of its customers. While it makes and could make no contention that the Government has taken its customers, petitioner does contend that they have been lost to it and that that loss should be compensated. We deal directly with that contention in Point II of our Argument, *infra*, pp. 41–46. But because petitioner, in the course of making that argument, appears to reject the rental value of the use of its facilities as the applicable measure of compensation (Br. 30–31, Pt. XV; Br. 116–117, par. 13; Br. 123–128), we have endeavored to show that petitioner has been fully compensated under that settled rule of compensation, a rule which has grown out of and survived the test of experience in cases of this sort.

On this phase of the case, petitioner states that its laundry plant was "totally taken" on November 21, 1942 (Br. 2; cf. Br. 125), and that the plant was declared surplus and abandoned on March 22, 1946 (Br. 2, 5–6, 125). The argument apparently made is that the measure of compensation is either the full fee value of the property or the difference between the fee value at the time of the taking and at the time of its return to the laundry company (R. 27–31, 91–93, vol. IV, p. 8; Br. 27, Pt. VIII; Br. 31–32, Pt. XVI; Br. 123–128).

In making these contentions, petitioner endeavors to rely upon the Act of October 16, 1941, 55 Stat. 742, as amended by Title VI of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 181, secs. 601–602, as amended; 50 U. S. C. App. (1940 ed.) Supp. V, secs 721–722 (Br. 3, 32–33, 124; App. pp. 8–13). That Act authorized the President to requisition personalty for military or naval purposes (i. e., equipment, supplies or munitions and machinery, tools or material necessary to manufacture, service or operate such equipment, supplies or munitions). It provided the means for determining the just compensation to be paid for the property requisitioned and further provided for the return of the property to the former owner if he desired it upon payment of its fair value as of the date of the return. That statute has no application here, and could hardly justify the petitioner's contentions even if it had. The authority to acquire real property together with personal property located thereon or used therewith is found in Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, sec. 171a.

It was under the Second War Powers Act that the present proceeding was instituted at the request of the Secretary of War (R. 1). By that Act, Congress expressly authorized the taking of temporary occupancy rather than the fee title.

Since the administrative determination to do so was not arbitrary or capricious it is binding upon petitioner. *United States v. Carmack*, 329 U. S. 230. Obviously no justification can be given for compelling the United States to pay the fee value of the property when it has only taken that limited interest and, thereafter, returned the property to the owner—property which, according to petitioner's own estimates, was worth $400,000 on the date of return (R. 315–316).

It is rather paradoxical that petitioner makes the alternative contention that the measure of compensation is the difference between the value of the property at the time of taking and at the time of its return. Under such a formula the owner whose property is taken temporarily might receive no compensation for its use. Thus, if the property were returned in much the same condition as when it was taken and the market were a stable one, he could conceivably be entitled only to depreciation. Insofar as the "before and after" formula depends upon market fluctuations rather than depreciation of the property it will make the award for temporary use depend upon what may often be a wholly irrelevant factor. Indeed, in the instant case the "before and after" theory, advocated by petitioner, if applied with proper regard to the items which are compensable, would result in a lesser award than the verdict. Peti-

tioner contends that its loss is $592,567.04 (Br. 12). But this computation includes an award of $340,516.85 for loss of trade routes, an item which is not compensable (see point II, *infra*, p. 41). If this item is excluded the total award on petitioner's theory, and based on its own figures, would be $252,050.19 as opposed to the verdict of $297,776.03 or $45,725.84 less than the amount awarded.[12] It is thus apparent that petitioner here advocates the before and after theory only as a device to include the alleged loss of trade routes in the award.

Petitioner also asserts from time to time that the trial court allowed it to recover only "interest" on the appraised value of the property (Br. 2, 14, 17, 27, 30, 121–123; see also R. 7, vol. IV). As pointed out above (pp. 32–33), one of the items considered by witnesses for both the owner and the Government in computing compensation for the use of the property or fair annual rental was a fair return on the value of the property

[12] For purposes of this illustration, we have taken the figures set out in the petitioner's brief (p. 12). In fact, the offer of proof of "before and after value" alleged a total loss of $561,316.04 (R. 316) rather than $592,567.04 stated in the brief. This difference of $31,251.00 is due to the fact that the computations in the brief are based on various bits of evidence, many of them excluded rebuttal testimony, from which petitioner arrives at a value on date of return of $395,057.28, rather than the $426,208.28 stated in the offer of proof. Taking the figures of the offer of proof but excluding loss of trade routes, petitioner's loss would be $76,976.84 less than the amount awarded.

(R. 332–333, 457, 730, 735, 769). Thus, the court in its charge referred to "interest" on the value of the property as one of the "yardsticks" to be considered in arriving at an annual rental (R. 139). This "yardstick" was not only used by petitioner's witnesses, but petitioner did not object to the use of the term in the instructions. Rather it objected to the use of the term "rental" in the charge (see R. 165–166). Here again under the circumstances of the trial of this case, there could have been no misunderstanding by the jury.

II

THE PETITIONER, HAVING BEEN FULLY COMPENSATED FOR THE TEMPORARY TAKING OF ITS PROPERTY, IS NOT ENTITLED TO A FURTHER AWARD FOR LOSS OF GOOD WILL OR TRADE ROUTES. THE GOVERNMENT DID NOT TAKE PETITIONER'S GOOD WILL OR ITS TRADE ROUTES, AND THE COURTS BELOW DID NOT ERR IN HOLDING THAT EVIDENCE OF VALUE OF THE TRADE ROUTES WAS INADMISSIBLE

Petitioner's contention is that the courts below erred in not permitting it to recover for the alleged destruction of its trade routes (Br. 25–26). Petitioner asserts that it was "driven from business" (Br. 2, 25) and that its trade routes were "totally destroyed" (Br. 9, 25). Petitioner's protests, here and below, that this is not a claim for loss of profits, damage to good will or injury to its business (Br. 9–10, 134) amount to nothing

more than a quibble as to the definition of those terms.

At the trial petitioner sought to have A. L. Jacobberger testify to the value of "the Kimball Laundry *Company*,"[13] before and after the taking (R. 315–316). As the offer of proof shows, the testimony thus sought to be introduced was the "before and after" value of the land, building, machinery, equipment and the trade routes, the latter being "evaluated by numbers of customers of different kinds" at $340,516.58 (R. 316). Inasmuch as the "before and after" values of all items included in the offer of proof, with the exception of the trade routes, were admitted on behalf of petitioner elsewhere in the course of the trial (R. 260, 264, 273, 306, 330), it appears that in computing the total difference between the value of the laundry company before and after the taking, Mr. Jacobberger allowed for the complete destruction of the value of the trade routes (see *supra*, pp. 10–11, 17–18, and Br. 13). Petitioner also offered to prove the same value of the trade routes by an exhibit prepared by Harry E. Judd, a certified public accountant, who, it was said, would testify that he arrived at the conclusions of value shown on the exhibit in accordance with the standard method used by laundries in evaluating customers and trade routes and approved

[13] Italics supplied.

by the Board of Tax Appeals (D. Ex. 14, R. 368–370). It is contended that the trial court erred in excluding this and other evidence bearing on the value of the trade routes and in refusing to instruct the jury to consider their value (see, e. g., Br. 23–26, 113, 120–123, 127).

A. *Business losses are not compensable under the Fifth Amendment.*—It is well settled in the federal courts that business injuries, such as loss of profits and damage to good will, like other consequential losses resulting from the taking of private property for public use, are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Company*, 327 U. S. 372, 377–378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379–380, 383; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Bothwell* v. *United States*, 254 U. S. 231; *United States* v. *Beckstold Co.*, 129 F. 2d 473, 476 (C. C. A. 8); *Ralph* v. *Hazen*, 93 F. 2d 68, 70–71 (App. D. C.); *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5); *In re Post Office Site in Borough of The Bronx*, 210 Fed. 832 (C. C. A. 2); *United States* v. *Meyers*, 190 Fed. 688 (D. Conn.); *Lehigh Valley Coal Co.* v. *Chicago*, 26 Fed. 415, 417 (N. D. Ill.) As this Court said in the *Powelson* case, *supra*, at pages

281–282: "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken * * * not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." Accordingly, in the *Mitchell* case, *supra,* the owner was denied compensation for the destruction of his business which resulted from the taking of his land even though the business could not be re-established elsewhere. And in the *Bothwell* case, *supra,* the court held that there was no obligation on the part of the United States to pay the loss due to a forced sale of cattle at prices below their fair market value or for destruction of the business resulting from the taking.

This Court has recognized, as was pointed out in *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377, that by the denial of recovery for business and other consequential losses the owner often receives less than the value of the property to him or for his particular purposes, but as was also pointed out in that case, the just compensa-

tion guaranteed by the Constitution is nevertheless limited to "the value of the interest taken." This settled rule supplies a standard of objectivity essential to governmental administration in this field.

B. *Petitioner's business has not been taken.*—Contrary to petitioner's contentions, the fact that the value of petitioner's trade routes (business relationships) may have been injured, or even destroyed, does not mean that they have been "taken" so as to give rise to a right to compensation therefor. *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89–94; *Omnia Co.* v. *United States*, 261 U. S. 502. "Destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." *Omnia Co.* v. *United States, supra,* at page 508. In the latter case, the claimant was the owner of a contract to acquire steel plate at a price under the market. The United States requisitioned the steel, thus destroying the value of the contract, but it was held that the contract had not been taken and that the owner was not entitled to be compensated for its loss. This Court said (p. 510) that "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. * * * If, under any power, a contract or

other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." Again, at page 513, the Court said: "The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things." Similarly, in *Mitchell* v. *United States*, 267 U. S. 341, 345, it was held that the destruction of a business caused by taking the land on which it was carried on was not a "taking" of the business.

Cases like *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, and *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, relied upon by petitioner (see Br. 109–117), do not establish a contrary rule. In the *Brooks-Scanlon* case, *supra*, the United States took a contract for the construction of a ship. As the Court said (p. 120), it "put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would

have had." Consequently, it was held (pp. 123–124) that the measure of compensation was "the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder * * *." In the *Monongahela* case, *supra*, the United States took a lock and dam constructed at the invitation of the United States and under a franchise from the State of Pennsylvania. As this Court has since pointed out, it was there held that the franchise was "an integral part" of the property so that it was taken when the property was taken and its value was required to be included in the compensation payable. See *Omnia Co.* v. *United States*, 261 U. S. 502, 513.[1] Here, the United States did not take petitioner's trade routes. It took the laundry company property, not to go into the laundry business in Omaha, but merely to perform a necessary function in the

[1] Moreover, as has been pointed out in subsequent cases, the decision rested primarily on estoppel. *Omnia Co.* v. *United States*, *supra*, at pp. 513–514; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282, footnote 12. The result reached in the *Monongahela* case appears highly questionable, and in any event should not be extended to the instant situation, which is clearly distinguishable. *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (C. C. A. 2), relied upon by the petitioner (Br. 109, 116), follows the view that there was a taking of a public utility's franchise and hence the taking of property for which compensation must be paid, and, like *Monongahela*, is readily distinguishable.

prosecution of the war, that of providing laundry and dry-cleaning services for the members of the armed forces. It did not put itself in the shoes of the Kimball Laundry Company, nor did it attempt to take advantage of that company's trade routes by serving its customers. As the court below said (R. 8, vol. IV):

> * * * The Government took exactly what it purported to take, namely, the temporary use and occupancy of the Company's laundry. The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes, or customers. No doubt the Government's occupation of the plant disrupted and damaged the Company's business, although it could hardly have destroyed the demand for laundry service in the city of Omaha or disabled the Company from ever re-establishing its business. * * *

This statement of the court below may, indeed, reflect an overly generous appraisal of the petitioner's evidence. Petitioner offered to prove that the taking in 1942 disabled it from serving its customers (R. 437–438). Also, it offered computations by an accountant prepared in 1943 representing operating loss for the three years "commencing from date plant was taken to re-establish condition existing November 21, 1942" (R. 370–382). But as the court below pointed out, the

Government's occupation did not disable the Company from re-establishing its business when the property was returned in 1946. It cannot be assumed that the demand for laundry service in Omaha was any less in 1946 than it was in 1942. Any extra expense which might be incurred in securing the return of petitioner's old customers or of securing new customers would depend on many factors such as the population of Omaha, general business conditions, the price situation, the ability of the personnel of the Company and many similar factors which might indeed result in a better business situation in a short time after return. Thus, a conclusion that petitioner has been injured by loss of patronage of its customers could not be based upon any factual evidence proffered by petitioner but purely on speculation as to various factors relating to its business prospects in 1946.

C. *This case presents no exception to the rule that business losses are not compensable.*—While petitioner apparently contended in its petition for certiorari (Pet. 33) that because it was the fee owner of a laundry which was a going business and because the Government took only a temporary use, the foregoing well-established principles do not apply and that a novel question is presented, petitioner now seems to contend that the same principles apply whether the Government takes a temporary use or an absolute fee title

(Br. 111) and that the question presented is whether the Government may avoid payment of compensation for its trade routes by taking a temporary use rather than the fee (Br. 116–117, see also Br. 112). Whatever the precise nature of the question sought to be presented, petitioner's contentions were answered in *United States* v. *General Motors Corp.*, 323 U. S. 373. In that case, this Court said (p. 382):

> * * * Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.

Continuing (p. 382), this Court said that it was "altogether another matter when the Government does not take the citizen's entire interest, but by the form of its proceeding chops it into bits" and held that in the case of temporary takings certain

necessary costs incurred by the condemnee, such as the cost of removal of personal property, its storage and return, should be considered in determining the market price for the temporary occupancy. However, it was further held (p. 383), that "Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning."

Thus, although the result of the *General Motors* case was to allow compensation for items previously regarded as non-compensable, the holding was an exceedingly narrow one (*United States* v. *Petty Motor Co.*, 327 U. S. 372), and the Court expressly preserved the rule prohibiting compensation for consequential damage, and in particular in respect of business losses and damage to good will. Petitioner seeks to extend the result of the *General Motors* case to include the very things which the Court specifically stated could not be included. The necessary expenses incurred as a result of having to remove personal property from the premises and subsequently return it represent an actual outlay of money due to the temporary taking of the building in which it was located. Even so, the Court did not allow these expenses *as such*, but only as reflected in the rental value allow-

able. Moreover, while the ascertainment of the amount of such expenditures may involve substantial difficulty, they may ordinarily be determined with some degree of accuracy and their reasonableness verified. "Good will,"[10] on the other hand, represents an intangible asset, the value of which depends upon many varying and speculative factors. Inasmuch as the value of "good will" has never, so far as is known, been awarded as part of just compensation for the taking of property under the power of eminent domain, no criterion for measuring its value is found in the eminent domain cases. However, turning to other fields where good will must sometimes be valued, we obtain some indication of the elusive and complex problem presented and can see how remote such value is from the value of what was taken; i. e., the physical property, and how dependent it is upon speculative elements which should have no part in determining just compensation for the physical property.

The value of the good will of a business includes the full value of the *enterprise* in excess of the value placed on the tangible property. II Bonbright, Valuation of Property (1937), pp. 727–734, 756. Although, as Bonbright points out (pp.

[10] As will be shown, *infra*, p. 59, the value of petitioner's trade routes is the same as the value of "good will" which in turn is synonymous with the value of the business as distinguished from the value of the physical property.

727-728), "good will" may properly be given a restricted meaning; i. e., that it is "the probability that old customers will return to the old stand," it is generally thought of as "the whole complex of intangibles—the attitude and economic condition of old and new customers, the relations, legal and nonlegal, to employees and sources of supply, the quality of management, the ability of the organization to produce and market efficiently, the existence and character of competition, general business conditions and prospects, sometimes franchises, patent rights, etc.—which will enable the going concern to yield high earnings." All of these speculative elements enter into the value of the good will of the Kimball Laundry Company as an *enterprise* at the date of the taking of the physical plant.

But the *enterprise* was not taken. The Company kept its name, its books and its lists of customers. As the court below said (R. 8, vol. IV), the taking could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business. The time it would take to rebuild its patronage and the extent to which profits would be lowered during that time would depend upon the demand for laundry service in Omaha, the economic conditions, the kind and amount of competition, the skill of the managers and personnel, etc. Clearly, none of these influences on

the value of the enterprise, whether favorable or unfavorable, could be attributed to the temporary taking by the Government. See *supra*, p. 49.

Petitioner has been paid for the use of its property during the temporary occupancy and the property has been returned, together with payment of the amount necessary to restore the property to the same condition it was in when the Government acquired it. The amount allowed—market rental value—*includes* an objective allowance for the income-making potentialities of the property in the form of a fair return on the value of the property. Anything additional would be unjustified. There is no more reason to compensate petitioner for any specific business losses which may be suffered while it re-establishes its enterprise than there is to compensate the fee owner whose entire property interest is taken and who must acquire new premises and re-establish his business elsewhere or who must start up a new business if, as in *Mitchell* v. *United States*, 267 U. S. 341, 343, the same business cannot be re-established elsewhere. In fact, the allowance of the Kimball Laundry Company's claim in this case would be demonstrably unjust. On the basis of the company's own estimates of value, it would have been entitled to recover only $600,000 to $650,000 (R. 423–424, 457) if the Government had taken a fee simple estate and would have recovered nothing for any business losses. Since the Govern-

ment took only a temporary use of the property the jury awarded the company approximately $300,000, of which $252,000 represents compensation for the use of the property during the Government's occupancy (R. 95–96). This sum, computed at the rate of $70,000.00 per year (R. 96) is more than the net income of the laundry for any year in the past 19 years with the exception of 1930 (see Def. Ex. 4, col. 2, R. 204). In fact, it is almost twice the company's average net income for the last 5 complete years of operation prior to the taking (1937–1941). The property has been returned to the company, together with payment for damages caused by the Government's use. While petitioner may not agree with the amount awarded by the jury for the latter item, it represents the sum which the jury found would place it in the same position so far as the physical property is concerned as when the Government took possession. Yet, petitioner claims an additional sum of $340,516.85. (R. 316; Br. 12) for alleged destruction of the value of its trade routes, which when added to the $252,000 awarded for the use of the property amounts to $592,516 and is the approximate equivalent of the fee value of its property when it still has the property (which according to petitioner's own figures (R. 316) was worth over $400,000 when returned), to do with as it wishes, either to sell it or to go back into the laundry business.

Apparently on the theory that taking part of the owner's estate is similar to taking part of the tract of land, petitioner also relies upon the so-called "severance damage" cases (Br. 117–121). The rule laid down in that line of cases was recently summarized as follows in *United States* v. *Miller*, 317 U. S. 369, 376: "If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage." The "severance damage" theory cannot be used as a device to recover business losses. As we have shown, *supra*, pp. 43–46, the fact that a taking of the owner's property results in a destruction of his business does not give rise to a right to compensation for the business. This rule is applicable not only where all of the property is taken but also where part has been taken. Thus, in *Ralph* v. *Hazen*, 93 F. 2d 68, 70–71 (App. D. C.), where part of a tract on which was located a garage was taken, it was held that damages to the garage business could not be included in determining the compensation to be paid. Similarly, in *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5), it was held that when part of a tract of land used for a brick manufacturing plant was taken, the fact that the plant was making money could be considered, but the business was not to

be valued as such, nor was any loss of profits to be compensated for." See also *Baetjer* v. *United States*, 143 F. 2d 391, 396 (C. C. A. 1), certiorari denied, 323 U. S. 772; *see United States* v. *7,936.6 Acres of Land*, 69 F. Supp. 328, 332 (P. R.).[18]

Petitioner's reliance (Br. 117–118) on *United States* v. *Chicago, B. & Q. R. Company*, 82 F. 2d 131 (C. C. A. 8), certiorari denied, 298 U. S. 689, is misplaced. Whatever the merits of that decision, it is clear that the court of appeals suggestion in that case that cases like *Gibson* v. *United States*, 166 U. S. 269, have been overruled

[18] Petitioner relies (Br. 117, 119, 121) upon *United States* v. *257.654 Acres of Land, Etc.*, 72 F. Supp. 903 (Haw.). That case is now pending on an appeal taken by the Government on the ground that it represents an improper allowance of business loss in the guise of severance damage. Moreover, even if the district court's analysis of the facts in that case is accepted, it does not support petitioner's claim. The court there held that the taking of certain physical property diminished the actual market value of other physical property not taken. As thus analyzed, the case presented the ordinary problem of severance damage. This has no application to the instant case where petitioner's claim is that the temporary taking of the physical property impaired the value of its trade routes. The value of the trade routes represents a mere expectancy of a continuing business relationship rather than any property right in the customers. Any injury to the trade routes would be a typical business loss which, it is well settled, is not compensable. This distinction between diminution in the value of physical property, on the one hand, and impairment of business expectations on the other has been precisely the line of distinction between that which is compensable and that which is not. Cf. *Baetjer* v. *United States*, *supra*, at pp. 395–396.

(82 F. 2d at 134–135), and that the words "or damaged" have now been added to the word "taken" in the Fifth Amendment (82 F. 2d at 139), cannot stand in the light of this Court's recent decisions. See, e. g., *United States* v. *Willow River Co.*, 324 U. S. 499, 502, 510. The opinion in the *General Motors* case, in any event, itself supplies sufficient answer to petitioner's argument. It was there said (323 U. S. at 379–380):

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of goodwill which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

While it is clear, as pointed out above, pp. 41–43, that in attempting to recover for the alleged destruction of its trade routes, petitioner seeks to

recover a business loss, its brief (pp. 9-10, 122) confuses the issue by denying that it seeks to recover for good will, loss of profit and loss of further business as it did in the trial court (see R. 315). Its theory seems to be that the value of trade routes does not represent good will, profits or other business value and that it is admissible as part of the composite value of the plant as a going concern (Br. 111, 114).

However, the very cases relied upon by petitioner as justifying the method used by its witness Judd in valuing the trade routes (R. 368–370) show that the value which it was sought to have the jury consider was the value of good will. In both *Appeal of Metropolitan Laundry Co.*, 2 B. T. A. 1062, and *Pioneer Laundry Co. v. Commissioner*, 5 B. T. A. 821, it was held that the value of good will acquired by the corporate taxpayer when it purchased another laundry should have been included in the computation of its statutory invested capital for income and profits-tax purposes. As appears in the opinions, good will consisted of the value of the drivers' routes and customer lists.

Petitioner emphasizes throughout that its laundry was a "going" business and attempts to distinguish certain of the cases holding that damages to a business are not compensable on the ground that they did not involve a "going" business (Pet. 35–37; see Br. 113–114). Petitioner's claim,

which is for the recovery of the value of its good will or the business, is to be distinguished from "going concern" value which under certain circumstances may be taken into consideration in valuing the property on the basis of reproduction cost. *Banner Milling Co.* v. *State of New York*, 240 N. Y. 533, 148 N. E. 668, certiorari denied, 269 U. S. 582; see Orgel, Valuation under Eminent Domain (1936), sec. 191. In the *Banner Milling Company* case, *supra*, the property taken had been used for a flour mill. It was held that the plant was to be valued "as a live, going flour mill" and, therefore, that in determining fair market value it was proper to consider, not only the cost of reproducing the physical plant, "but also the cost necessarily or reasonably expended in bringing the mill or factory into efficient working condition, which has been called the synchronizing of its parts." Consequently, architect's fees in making and revising plans and compensation for engineers to carry out the plans or to arrange the factory so as to produce appropriate manufacturing results, were held to be elements which should be considered in estimating the market value. However, these elements were carefully distinguished from the value of good will which, it was held, could not be taken into consideration. Similarly, in *Chicago* v. *Farwell*, 286 Ill. 415, 121 N. E. 795, the court held that value based upon the profits

derived from the operation of a soap factory could not be recovered under the guise of "efficiency" or "going" value.

All the evidence offered by petitioner as to the reproduction or replacement cost of the building, machinery, and equipment was admitted (R. 258–260, 264, 272–273).[9] The trial court also admitted much testimony as to the location, growth and expansion of the plant and its capacity (see R. 229–232, 265–266, 274–278, 386–388, 390–391), including the amount of laundry work done each year from 1932 through 1941 (R. 279–283), the gross receipts from the various types of laundry and dry-cleaning services rendered from 1936 through 1942 (R. 229–235, 238–242), the prices being charged for such services under O. P. A. ceilings in November 1942 (R. 295–297), and the total number of customers being served on November 21, 1942 (R. 235–237). Thus, while the trial court properly excluded evidence of the value of the business as such, it permitted petitioner to show how much business it had and that

[9] The "value installed" of machinery and equipment on the date of taking as shown on appellant's exhibits was based on the cost of replacing it with like machinery in the same condition and included installing it ready for operation (R. 246, 249, 270, 308).

It may also be noted that in spite of the Government's objection, reproduction cost of the building was admitted without requiring any deduction for depreciation (R. 262–263).

it was successful. Cf. *Stephenson Brick Co.* v. *United States*, 110 F. 2d 360 (C. C. A. 5).[15]

Having admitted evidence of gross income and the like, it was proper for the court to instruct the jury that such evidence was admitted only to show that it was a going concern (R. 155, see also R. 229, 231–232, 236). Moreover, Harry Jacobberger, one of petitioner's witnesses when asked on cross-examination what elements he had included in valuing the use of the property, had said that he included "nothing but the rental of a business" and that the figure he had testified to was based on "the value that plant had to us as a going concern" (R. 426–427). Since it appeared that the witness, as petitioner does here, included the business value to petitioner within his definition of "going concern" value, the trial court properly instructed the jury that the going-con-

[15] In this connection, it should be noted that the trial court, in excluding Def. Ex. 7 showing the gross income of the company from 1924 through 1942, stated that the exhibit would be admitted if there were attached a statement of net earnings (i. e. after deduction of all expense of operation, salaries, etc.) (R. 219–221). No offer of proof in compliance with this suggestion was ever made. Petitioner's suggestion (R. 220) that its proffered Ex. 4 (R. 204) would suffice for that purpose was properly rejected by the court on the ground that it contained other items which "should not be in there" (R. 220). Moreover, the gross income from 1936 through 1942 was admitted in the form of yearly receipts for the various types of work done (Def. Ex. 10, R. 233–234). The totals appearing in the last column of Def. Ex. 10 are the same as the gross income for those years as shown on the excluded exhibit (see R. 221).

cern value sought to be placed on the property by the Kimball Laundry Company was not competent (R. 155) and that the element of going concern which Harry Jacobberger had stated he had considered on cross-examination should be disregarded (R. 156).

Finally, as this Court pointed out in *Omnia Co.* v. *United States*, 261 U. S. 502, 510, "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material." Hence, the fact that whatever business disruption there was resulted from the Government's need of its property for war purposes gives the petitioner no greater right to compensation than those who suffered similar losses because of governmental need for services of individuals or for raw materials upon which a business depends. Petitioner's claim based upon alleged loss of its laundry customers is even more remote than the actual contracts for future services or delivery for whose loss no compensation was permitted in the *Omnia* case. No proof is required that because of the exigencies of the recent war persons suffered many losses through frustration of their earning ability as individuals or through similar frustration of the ability of businesses to serve their customers. For example, substantial sacrifice in income was required of many persons who were drafted into the armed forces. Many busi-

nesses suffered like losses. In *St. Regis Paper Co.* v. *United States*, 110 Ct. Cls. 271, certiorari denied, No. 74, this Term, the Paper Company was compelled to shut down as a result of governmental restrictions upon the use of pulpwood. Nevertheless, the Company rather than the Government had to bear the loss caused thereby, which was claimed to be $376,754.86 out-of-pocket expense, $228,173.14 deterioration and depreciation charges, and $2,694,686.83 loss of profits.

We submit, therefore, that the courts below were clearly correct in concluding that business losses and injury to good will are not compensable and that the claim for the alleged value of trade routes is, in fact, simply a claim for such losses. With this exception, petitioner was accorded every opportunity to show the value of the plant and the fact that it had a profitable business located on the property.

D. *The evidence relating to petitioner's good will value ("trade routes") reflects the typically speculative nature of such value.*

The value of $340,516.85 claimed by petitioner for its trade routes appears to be computed by valuing each customer at an arbitrary figure (for example, $20 for each trade route customer) said to be based on trade practice (Br. 9).

Petitioner contends (Br. 8–10) that it has paid its "route men" during the six years previous to the taking a total of $237,654.83 in salaries and commissions, to establish its trade routes. It also

claims to have spent further sums—not specified—to build up its business (Br. 8). And it argues that after it reopens its laundry it will be compelled to incur net losses for the first three years, presumably by reason of expenditures incurred to regain its trade routes. (Br. 10.)

All these considerations are highly speculative. They are also highly detrimental to any rational program of land acquisition on the part of the Government. If as a result of a temporary taking the Government is to be compelled to reimburse a landowner for items of this kind, incurred in the normal course of operating a business, the budgetary consequences will be completely unpredictable. Before taking a particular piece of property the Government would be forced to analyze in detail the past business history of the property owner—as well as any expenses that he might consider necessary to incur at some future date when the property has been returned to him.

Petitioner's proffered evidence of good will value in support of its claim to approximately $340,000, in addition to the amount awarded it, should be considered in conjunction with an analysis of its own figures as to its actual net income. These income figures are not sufficiently detailed or pointed to permit an entirely reliable conclusion as to a fair capitalization of the value of petitioner's business. But they do raise serious doubts as to the validity of petitioner's good will value figures, and the inconsistency of results serves

to buttress the established view that good will value is so speculative as to make its inclusion in just compensation inadmissible.[19]

Thus, defendant's Exhibit 4 (R. 204) shows that for the last five years (1939–1941) preceding the taking, the average net income of the Kimball Laundry Company before deducting depreciation and income tax was $39,375.39 per year (see Column 2). If this sum is capitalized at six percent, the value of the entire enterprise, including the physical property and the business or good will, would be $656,256.50, which is approximately the fee value of the physical plant as claimed by petitioner (see R. 423, 424, 457). Obviously, if the physical property has the value claimed by petitioner, a net return of only 6 percent on that value leaves no room for any additional value for good will. If, on the other hand, it is assumed that the company had the good will which petitioner claims ($340,516.85),

[19] The fact that value based on the income includes the value of the business or good will which are attributable to numerous speculative elements such as the skill of management, the nature of competition and general business conditions is the primary reason for excluding evidence of income for the purpose of showing the fee value of property condemned. See Orgel, Valuation Under Eminent Domain, secs. 154, 158, 161, 173; 2 Nichols, Eminent Domain (2d ed. 1917), p. 1173; *Accounie Realty Co.* v. *St. Louis*, 347 Mo. 1224, 1227, 1229; *Matter of City of Rochester (Smith St. Bridge)*, 234 App. Div. 585, 587 (4th Dept.); *Sauer* v. *The Mayor*, 41 App. Div. 305, 308 (1st Dept.); *Gauley & E. R. Co.* v. *Cauley*, 84 W. Va. 489, 493; see also, *Talley* v. *Boston & Providence Railroad*, 182 Mass. 537, 539.

then the physical property could have no such value as that claimed by petitioner but would be approximately $315,739.65. Thus, it can be argued on the basis of petitioner's own figures either that the company had no good will or that petitioner is attempting to recover for it twice; i. e., by including it in its estimates of the fee value of the physical property and then adding it as a separate item to arrive at an alleged value of over $900,000 for the entire enterprise.

Moreover, in computing the rental value of the property, petitioner's witnesses felt that a return of 10 percent, or $65,000 should be allowed on the value which they placed on the physical property alone (R. 333, 457). If 10 per cent is considered a proper return and petitioner's estimate of the value of the physical property is accepted, the laundry company was not even making what would be considered a fair return on its property alone and there are no additional earnings representing a return on intangible assets such as "good will."

The correctness of petitioner's claim that its witness followed the method of valuing good will approved in *Appeal of Metropolitan Laundry Co.*, 2 B. T. A. 1062 and *Pioneer Laundry Co.* v. *Commissioner*, 5 B. T. A. 821, is doubtful. In those cases, the value was computed by multiplying the weekly receipts by the good-will value attributed to each dollar of receipts. But petitioner's witness, instead of using weekly receipts as a factor, substituted merely the total number of customers (R. 370). This process would seem to omit an essential element; i. e., the amount of receipts and profits for which each customer might be responsible.

We are not to be taken as contending that petitioner's enterprise possessed no "good will" in the ordinary sense. The above is offered, as we have said, simply to indicate the difficulties and doubts inherent in any attempt to evaluate good will in a condemnation case of this character.

It has already been pointed out (*supra*, p. 61) that the allowance for rental value awarded the petitioner in this case includes and reflects the fact that the property taken was used by a going concern. The generous extent of the award is indicated by the fact that a rental of $70,000 a year was allotted to the petitioner, as contrasted with the previous net annual average income of $39,375.39 referred to above. Petitioner has also received an award to restore the premises to their original condition. Under the Constitution, no more is required.

III

OTHER ALLEGED ERRORS SPECIFIED AS GROUNDS FOR REVERSAL ARE WITHOUT MERIT

A. *The trial court did not err in ruling that the Government's witnesses were qualified to testify.*—Petitioner states that certain of the Government's witnesses were not qualified to testify (Br. 26–27; see also Br. 16–18). These witnesses were C. R. Crowder, an engineer in the mechanical and electrical section of the United States Engineers Office in Omaha, who had had a great deal of experience in supervising and preparing estimates of the cost of constructing laundries and installing

and repairing laundry equipment, including the restgration of government-leased laundries elsewhere (R. 609–610, 658–661, 715); Cornelius G. Weber, an engineer and appraiser of wide experience, having been associated with the American Appraisal Company for 24 years and having appraised many industrial plants, including laundries (R. 722–723); and Lewis Sholes, a lifetime resident of Omaha, who had been in the real estate business for 46 years and in the appraising business for the last 20 or 25 years and who had appraised six other laundry plants in recent years (R. 760–761). Clearly, these witnesses, as the court below held (R. 12, Vol. IV) were qualified to estimate the rental value of the laundry, the damage to machinery and equipment and the cost of repairing and replacing it. Moreover, whether an expert witness is qualified to testify is primarily a question for the trial judge whose determination can be upset only for an abuse of discretion (R. 12, Vol. IV). *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 354; *Chapman* v. *United States*, 169 F. 2d 641, 645 (C. C. A. 10), certiorari denied, No. 375, this Term; *Love* v. *United States*, 141 F. 2d 981, 983 (C. C. A. 5). No abuse of discretion can be shown here. Under Crowder's supervision, Denton J. LaTurner and Ross I. Newcom, two engineers connected with the American Laundry Machine Company (R. 546, 571, 601) and A. J. Pargett, a construction engineer employed in the United States Engineers Office (R.

523) examined the machinery and equipment and jointly prepared exhibits showing the cost of repairing, replacing and relocating it (see R. 571–572, 583–584, 587–588, 599–601, 610–611, 619, 622, 630–631). Each of these witnesses, including Crowder, testified as to items which they had personally examined and Crowder gave the total of all items testified to (see R. 631–634, 647–648). Sholes together with petitioner's witness Goodwin examined the property in 1942 before the taking and made an inventory and appraisal at that time and also in 1945 (R. 246, 251, 771, 782–783). His inventory and appraisal were available to other Government witnesses who had not seen the property at the date of taking (R. 725). The former master mechanic of the Kimball Laundry Company accompanied Weber on his examination of the property and described the changes which had taken place in the condition of the machinery (R. 725). Floor plans showing the location of equipment at the time of taking and lists of items moved out of the building by the Government were inspected by the witnesses (Gov't. Ex. 9, R. 620–622, 634, 725). Thus, as the court below said (R. 12, Vol. IV), "The fact that many of the Government's experts on value or on damage to equipment and machinery had not seen the laundry in 1942 did not disqualify them to testify to their estimates of its value at that time. They had heard the condition of the plant and machinery fully described, and assumed that it was in either

good or first-class condition at the time the Government took over."

Finally, although petitioner states its objection to the testimony of Sholes and Weber in the form of an objection to their qualifications; the gist of the complaint is not their qualifications, but their method of valuation. That complaint is dealt with in Points I and II, *supra*.

B. *The trial court did not err in excluding rebuttal testimony.* Certain evidence offered by petitioner to rebut the Government's testimony as to the cost of restoring the building and some of the machinery to its former condition was excluded by the trial court on the ground that it was part of the Company's main case (R. 827–839, 833–838, 846–849; cf. Br. 138). The order of proof on a trial is largely in the discretion of the trial court. *Philadelphia & Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 462–463; *McClellan* v. *Hein*, 56 Neb. 600, 77 N. W. 120. As the court below stated, there was no abuse of that discretion in this case (R. 13; Vol. IV). Petitioner's witnesses had already testified in the case in chief as to the cost of restoring the building (R. 306, 408, 412–415, 419). Rebuttal testimony as to the cost of repairing the laundry and dry cleaning equipment was admitted (R. 809–812, 814; Def. Exs. 48, 49, 50, R. 822–823). The only item of machinery repair offered on rebuttal which was excluded was the cost of replacing a boiler valued by petitioner in 1942 at $8,921.25 (R. 272). As

to this item, petitioner's testimony on its case in chief was that it was damaged beyond use and therefore an allowance for its full value was made (R. 272; see R. 847); whereas, the Government's testimony was that it could be restored to first-class condition for $5,817.50 (R. 639; see R. 849). Thus, the rebuttal testimony rejected by the trial court pertained to matters which not only could have been, but had been, gone into on petitioner's case in chief, and was, therefore, properly excluded. *United States* v. *Prettyman*, 142 F. 2d 891 (C. C. A. 4).

C. *The trial court awarded the proper amount of interest.*—The term taken in this case was one beginning November 22, 1942, and ending June 30, 1943, with the right to renew the term for additional yearly periods for the duration of the emergency (R. 2). At the time of the trial the term had been extended to June 30, 1946 (R. 83–85). Consequently, the question of compensation for the whole term thus far taken was submitted to the jury, as well as the amount of damages resulting from the use of the property up to the time of the trial. Although the jury was instructed to return a general verdict for the total compensation to which petitioner was found to be entitled, it was also instructed to make special findings as to the sum payable annually and as to the amount awarded for failure of the United States to return the property in the same condition it was on November

22, 1942 (R. 161; see R. 95–96). When property is taken prior to payment therefor, interest is allowed as part of just compensation from the date of taking until payment. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306 (1923); see *Albracht* v. *United States*, 329 U. S. 599, 602 (1947). The only term "taken" on November 22, 1942, was one ending June 30, 1943 (including, of course, the right to renew for additional yearly periods). The property was not *taken* beyond June 30, 1943, until the term was renewed, the new term being taken upon expiration of the preceding term. Since the taking, therefore, was of yearly periods and since the award was made on the same basis, interest at 6 per cent was properly computed on the sum allowed for each period from the beginning of the period until the date it was paid, making allowance for the sums deposited in court from time to time as estimated compensation (see R. 103–105).[21] Petitioner contends (R. 97–98; cf. Br. 128–129) that because the term taken was to terminate ultimately (under the last renewal) on June 30, 1946, there was established "for the purpose of this case a continuous period" between November 22, 1942, and

[21] A different situation is presented when the award is arrived at by reference to comparable transactions where the rental is payable at the end of the year or the rental is payable monthly. In such cases, interest should be computed upon the same assumption as to time of payment as was the award.

June 30, 1946, thereby requiring interest on the total award set forth in the general verdict, i. e., the "ultimate award." This contention is without merit. It amounts to saying that the entire three years and six months' term was taken in November 1942, and the Government at that time became obligated to pay the total due for the entire period. This is plainly contrary to fact since the obligation to pay for additional periods arose only when the term was successively renewed. And indeed, separate declarations of taking were filed for each period, see *supra*, pp. 4–5.

Moreover, the fallacy of petitioner's contention appears if its effect in other situations is considered. If, for example, the trial had been held shortly after the Government took possession and the jury had found the fair annual rental "determined as though the government had rented the property for a year with an option to renew from year to year" (see *United States* v. *16.747 Acres of Land in Delaware*, 50 F. Supp. 389, 391 (Del.), *supra*, pp. 29–30), and the Government had paid the rent thus determined each year as it renewed the term, it surely could not be contended that when the Government surrendered possession it would then have to pay interest as if the total amount of the rent ultimately paid had been due at the time possession was taken. The fact that the jury trial was not had until shortly before

the Government surrendered possession does not change the estate taken from a one-year term with an option to renew to a specified term of 3,6 years.

The argument is apparently made (Pet. 40; see also Br. 128–129; 131, par. 6) that the language of the Declaration of Taking Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a, requires interest to be computed in accordance with petitioner's contention. However, as this Court held in *Albrecht* v. *United States*, 329 U. S. 599, 605 (1947), the provision for payment of interest in that act is "no more than a statutory embodiment of the rule for determining constitutional 'just compensation' * * *."

Petitioner also contends that interest should have been allowed on the sum awarded for failure of the United States to return the property in the same condition as when taken from November 21, 1942, until paid (Br. 29, 131–132) and states (Br. 22) that no interest was allowed on this item. Interest was, in fact, allowed on this item from March 20, 1946 (the date of the verdict, R. 95), until paid (R. 105–106). Since the sum thus awarded arises out of the obligation to return the property in as good condition as when taken, reasonable wear and tear excepted, compensation for failure to comply with this obligation cannot be-

come due until the property is returned. Until that time it is not known how much, if any, damage there will be or whether the United States will itself restore the premises to their former condition before returning them or whether the owner must be compensated for the failure to return the premises in their former condition. Obviously, payment for damages occurring during the Government's occupancy is not due until the property is returned. Accordingly, the trial court was correct in awarding interest only from the date of the verdict which was rendered two days before possession was surrendered.

Petitioner further contends that it is entitled to interest on the sum of $34,875.50 for chemicals, soap and supplies alleged to have been taken on November 21, 1942, but not paid for until July 8, 1943 (Br. 23, 30, 132). The only mention of these items in the record is found in petitioner's answer and petition on appeal (R. 26, 94). The matter of acquiring the items mentioned and paying for them was handled entirely outside the condemnation proceedings and is no part of the proceedings. Moreover, the sum was paid as the result of an agreement between the United States and the Kimball Laundry Company. Interest is not allowable when just compensation is fixed by agreement of the parties. *Albrecht* v. *United States*, 329 U. S. 599, 602–604 (1947).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there is no reversible error in the rulings of the trial court and that the judgment of the Court of Appeals should be affirmed.

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